

PRIVATE INTERNATIONAL LAW

BY

G. C. CHESHIRE

D.C.L., F.B.A.

OF LINCOLN'S INN, BARRISTER-AT-LAW

MEMBER OF THE INSTITUTE OF INTERNATIONAL LAW

FORMERLY VINERIAN PROFESSOR OF ENGLISH LAW

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SOME ABBREVIATIONS USED IN THIS BOOK

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- Arminjon = *Précis de droit international privé*, par P. Arminjon, 3^{ème} éd. (1947-8).
- A.L.J. = *Australian Law Journal*.
- Bar = *International Law, Private and Criminal*, by Ludwig von Bar, translated into English by G. R. Gillespie, 2nd ed. (1892).
- Bate = *Notes on the Doctrine of Renvoi*, by John Pawley Bate (1904).
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- Beale on the Conflict of Laws = *The Conflict of Laws*, by J. H. Beale (1935).
- Breslauier = *Private International Law of Succession*, by W. Breslauier (1937).
- Burge = *Commentaries on Colonial and Foreign Laws*, by W. Burge, new ed. (1907-28).
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- Cheatham = *Cases and Materials on Conflict of Laws*, by E. E. Cheatham, H. F. Goodrich, E. N. Griswold, and W. L. M. Reese, 3rd ed. (1951).
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- Coleman Phillipson = *The International Law and Custom of Ancient Greece and Rome*, by Coleman Phillipson (1911).
- Cook = *Logical and Legal Bases of the Conflict of Laws*, by W. W. Cook (1942).
- Dicey = *A Digest of the Laws of England with reference to the Conflict of Laws*, by J. H. C. Morris and others, 6th ed. (1949).
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- Goodrich = *Handbook on the Conflict of Laws*, by H. F. Goodrich, 3rd ed. (1949).
- Graveson = *The Conflict of Laws*, 3rd ed. (1955).
- Grotius Society = *Transactions of the Grotius Society*.
- Hancock = *Torts in the Conflict of Laws*, by M. Hancock (1942).
- Hawkins = *A Concise Treatise on the Construction of Wills*, by F. V. Hawkins, 3rd ed. by C. P. Sanger (1925).
- H.L.R. = *Harvard Law Review*.
- I. & C.L.Q.R. = *International and Comparative Law Quarterly Review*.
- I.L.Q.R. = *International Law Quarterly Review*.
- Jarman = *A Treatise on Wills*, by J. Jarman, 7th ed. (1950).
- Jo. Comp. Law = *Journal of Comparative Legislation and International Law*.
- Johnson = *Conflict of Laws*, by W. S. Johnson (1933-7).

- Kuhn = *Comparative Commentaries on Private International Law*, by A. K. Kuhn (1937).
- Lalive = *The Transfer of Chattels in the Conflict of Laws*, by Pierre A. Lalive (1955).
- Laurent = *Droit civil international*, par F. Laurent (1880-1).
- Lorenzen = *Cases on the Conflict of Laws*, by Ernest G. Lorenzen, 5th ed. (1946).
- L.Q.R. = *Law Quarterly Review*.
- Mann = *The Legal Aspect of Money*, by F. A. Mann, 2nd ed. (1953).
- Mendelssohn-Bartholdy = *Renvoi in Modern English Law*, by A. Mendelssohn-Bartholdy (1937).
- M.L.R. = *Modern Law Review*.
- Morris = *Cases on Private International Law*, by J. H. C. Morris, 2nd ed. (1951).
- Nelson = *Selected Cases, Statutes, and Orders illustrative of the Principles of Private International Law*, by H. B. Nelson (1889).
- Niboyet = *Manuel de droit international privé*, par J. P. Niboyet (1928).
- Nussbaum = *Principles of Private International Law*, by A. Nussbaum (1943).
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- Schmithoff = *A Textbook of the English Conflict of Laws*, by C. M. Schmithoff, 3rd ed. (1954).
- S.L.C. = *Smith's Leading Cases*, 13th ed. (1929).
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- Stumberg = *Principles of Conflict of Laws*, by G. W. Stumberg (1937).
- Surville = *Cours élémentaire de droit international privé*, par F. Surville, 7ème éd. (1925-9).
- Theobald = *A Treatise on the Construction of Wills*, by H. S. Theobald, 11th ed. by J. H. C. Morris.
- Valery = *Manuel de droit international privé*, par Jules Valery (1914).
- Weiss = *Manuel de droit international privé*, par André Weiss (1920).
- Westlake = *A Treatise on Private International Law*, by John Westlake, 7th ed. by Norman Bentwich (1925).
- Wharton = *A Treatise on the Conflict of Laws*, by Francis Wharton, 3rd ed. by George H. Parmele (1905).
- White and Tudor = *White and Tudor's Leading Cases in Equity*, 9th ed. (1928).
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- Y.L.J. = *Yale Law Journal*.

PART I
INTRODUCTION

**CHAPTER I. DEFINITION, NATURE AND SCOPE OF
PRIVATE INTERNATIONAL LAW**

CHAPTER II. HISTORICAL ANTECEDENTS

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ACTION INVOLVING A CONFLICT OF LAWS**

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CHAPTER I

DEFINITION, NATURE AND SCOPE OF PRIVATE INTERNATIONAL LAW

THAT part of English law known as Private International Law comes into operation whenever the court is seised of a suit that contains a foreign element. It functions only when this element is present, and its objects are threefold. Function of private international law

First, to prescribe the conditions under which the court is competent to entertain such a suit.

Secondly, to determine for each class of case the particular municipal system of law by reference to which the rights of the parties must be ascertained.

Thirdly, to specify the circumstances in which (a) a foreign judgment can be recognized as decisive of the question in dispute; and (b) the right vested in the creditor by a foreign judgment can be enforced by action in England.

Private international law owes its existence to the fact that there are in the world a number of separate municipal systems of law—a number of separate legal units—that differ greatly from each other in the rules by which they regulate the various legal relations arising in daily life. The occasions are frequent when the courts in one jurisdiction must take account of some rule of law that obtains in another territorial system. A sovereign is supreme within his own territory, and, according to the universal maxim of jurisprudence, he has exclusive jurisdiction over everybody and everything within that territory and over every transaction that is there effected. He can, if he chooses, refuse to consider any law but his own. The adoption, however, of this policy of indifference, though common enough in other ages, is impracticable in the modern civilized world, and nations have long found that they cannot, by sheltering behind the principle of territorial sovereignty, afford to disregard foreign rules of law merely because they happen to be at variance with their own territorial or internal system of law. Moreover, as will be shown later, it is no derogation of sovereignty to take account of foreign law. Recognition of foreign laws

The recognition of a foreign law in a case containing a foreign element may be necessary for at least two reasons. Recognition necessary for two reasons :

In the first place, the invariable application of the *lex fori*, i.e. the local law of the place where the court is situate, would (1) To avoid injustice (1) To avoid injustice

often lead to gross injustice. To take an example given by Frederic Harrison,¹ suppose that a person engaged in English litigation is required to prove that he is the lawful son of his parents, who were married abroad many years ago. The marriage ceremony, though regular according to the law of the place where it was performed, did not perhaps satisfy the formal requirements of English law, but nevertheless, to apply the English Marriage Act to such a union, and thereby to deny that the parents were man and wife, would be nothing but a travesty of justice.

(2) To determine the rights of the parties Secondly, if the court is to carry out in a rational manner the policy to which it is now committed—that of entertaining actions in respect of foreign claims—it must in the nature of things take account of the relevant foreign law or laws. A plaintiff, for instance, claims damages for breach of a contract that was made and was to be performed in France. Under the existing practice the court is prepared to create and to enforce in his favour, if he substantiates his case, an English right corresponding as nearly as possible to that which he claims, but obviously neither the nature nor the extent of the relief to which he is rightly entitled, nor, indeed, whether he is entitled to any relief, can be determined if the law of France is disregarded. To consider only English law might well be to reverse the legal obligations of the parties as fixed by the law to which their transaction, both in fact and by intention, was originally subjected. A promise, for instance, made by an Englishman in Italy and to be performed there, if valid and enforceable by Italian law, would not be held void by an English court merely because it was unsupported by consideration.

As Bigelow has well said:²

‘If in a case before an American court the rights of the parties depend upon a transaction which took place in France, and the transaction is of a kind concerning which the French law and that of the American court are different, the question arises whether the transaction is governed by French law or not. If the court decides that it is governed by French law, then it is bound to apply that law in determining the rights of the parties, not from courtesy or politeness to France, but because justice requires it. The rights of the parties depend partly upon the circumstances of the transaction and partly upon the law which gave the transaction its force and effect. It would be as unjust to apply a different law as it would be to determine the rights of the

¹ *Jurisprudence and the Conflict of Laws*, p. 99. Graveson, op. cit., p. 6.

² In a note to the 8th ed. of Story, p. 38.

parties by a different transaction. In applying the French law, the court does not allow it to operate in America, but only recognizes the fact that it did operate in France.'

In justifying this reference to a foreign law, judges and textbook writers, following the theory of the great Dutch jurist, John Voet, have frequently used the term 'comity'. The term is, indeed, frequently found in English writings and judgments, but on analysis it will be found to be either meaningless or misleading. It can scarcely be given its usual meaning of 'courtesy', for if so it would be difficult to justify the readiness of English courts to apply enemy law in time of war. Moreover, courtesy implies reciprocity, and if it formed the basis of private international law a judge might feel compelled to ignore the law of Utopia upon proof that Utopian courts apply no law but their own. If, on the other hand, comity means that no foreign law is applicable in England except with the permission of the sovereign, it is nothing more than a truism. The fact is, of course, that the application of a foreign law implies no act of courtesy, no sacrifice of sovereignty. It merely derives from a desire to do justice. As a French jurist has remarked:

Comity not the basis of private international law

'When in a given case French law declares a foreign law applicable, it does this because it follows the system of conflict of laws which seems best and because French law thinks that the legal situation under consideration should be governed by the foreign law. . . . French law clearly withdraws because of its own decision, for French law under normal circumstances is always applicable in France. French law does not withdraw to make a sacrifice, but in order to administer the best justice, because in the hypothesis under consideration, the preferable solution consists in the application of a rule of foreign law.'¹

Private international law, then, is that part of law which comes into play when the issue before the court affects some fact, event or transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system. It has, accordingly, been described as meaning 'the rules voluntarily chosen by a given State for the decision of cases which have a foreign complexion'.² The legal systems of the world consist of a variety of territorial systems, each dealing

Private international law exists for cases containing some foreign element

¹ M. Ancel in *Travaux de la Commission de Réforme du Code Civil* (1951), p. 578; cited and translated *American Journal of Comparative Law* (1952), p. 412. For fuller discussions see Wolff, pp. 14-15; Beale, pp. 1964-5; Foster, *La Théorie Anglaise du Droit International Privé*, pp. 1 et seq. (Recueil des Cours, 1939).

² Baty, *Polarized Law*, p. 148.

with the same phenomena of life—birth, marriage, death, divorce, bankruptcy, contracts, wills and so on—but in most cases dealing with them differently. The moment that a case is seen to be affected by a foreign element, the court must look beyond its own internal law, lest the relevant rule of the internal system to which the case most appropriately belongs should happen to be in conflict with that of the *forum*.¹ The forms in which this foreign element may appear are numerous. One of the parties may be foreign by nationality or may have a foreign domicile; a trader may be adjudicated bankrupt in England, having numerous creditors abroad; the action may concern property situated abroad, or a disposition made abroad of property situated in England; if the action is on a bill of exchange, the foreign element may consist in the fact that the drawing or acceptance or indorsement was made abroad; a contract may have been made in one country to be performed in another; two persons may resort to the courts of a foreign country where the means of contracting or of dissolving a marriage are more convenient than in the country of their domicile.

Examples
of foreign
elements

It is frequently said that the function of private international law is to indicate the area over which a rule of law extends—that it 'deals primarily with the application of laws in space'.² The purport of this is that a rule of substantive law, e.g. the English rule that every simple contract must be supported by consideration, has *proprio motu* no dimension in space, for according to the terms in which it is expressed it applies to all contracts wherever made. But its dimension in space, i.e. its sphere of authority, is the very thing that is fixed by private international law, for a sovereign is free to provide, if he chooses, that the area over which a rule of substantive law, whether domestic or foreign, is to prevail shall be wider than the territorial jurisdiction in which it originated. If, for instance, an English court decides that the goods situated in England belonging to a man who died intestate and domiciled in France shall be distributed according to the provisions of the Code Napoléon, what it decides in effect is that the rule of the French internal law relating to intestacy is, in the case of persons domiciled in France, effective outside the territorial limits of the French law-maker. In the words of Savigny:

Meaning of
the state-
ment that
private in-
ternational
law fixes
the area of
a law's
authority

'It is this diversity of positive laws which makes it necessary to mark

¹ A convenient classification of law is into I. Public International Law; II. Municipal Law: (a) Internal Law, (b) Private International Law.

² Beale, p. 1.

off for each, in sharp outline, the area of its authority, to fix the limits of different positive laws in respect to one another.¹

This method of expressing the function of the subject is unobjectionable, and is perhaps helpful, provided that it is not understood in too literal a sense. It is not true that the sphere of application of each rule of law is, or can be, determined once and for all for every situation to which it may be relevant.² The area over which any given rule of law extends will vary with the particular circumstances in which its operation is under consideration. The English rules governing contractual capacity will apply to certain transactions effected by domiciled Englishmen abroad, but not to others.

Private international law is not a separate branch of law in the same sense as, say, the law of contract or of bankruptcy. It is all-pervading.

Private international law deals with three questions:

‘It starts up unexpectedly in any court and in the midst of any process. It may be sprung like a mine in a plain common law action, in an administrative proceeding in equity, or in a divorce case, or a bankruptcy case, in a shipping case, or a matter of criminal procedure. . . . The most trivial action of debt, the most complex case of equitable claims, may be suddenly interrupted by the appearance of a knot to be untied only by private international law.’³

Nevertheless, private international law is a separate and distinct unit in the English legal system just as much as the law of bankruptcy or of contracts, but it possesses this unity, not because it deals with one particular topic, but because it is always concerned with one or more of three questions, namely:

- (i) Jurisdiction of the English court.
- (ii) The choice of law.
- (iii) Jurisdiction of a foreign court.

We must be prepared to consider almost every branch of private law, but only in connexion with two matters—jurisdiction and choice of law.

The judge first decides whether he has power to adjudicate upon the case. This is the question of jurisdiction or of *forum*, and we shall find the fundamental rule to be that the court may entertain any suit where the *forum rei* is English, that is to say, wherever the defendant, whether he is a foreigner or not, is

The question of jurisdiction

¹ *Private International Law*, Guthrie's translation, p. 6.

² Cook, *Logical and Legal Bases of Conflict of Laws*, p. 7.

³ Frederic Harrison, *Jurisprudence and the Conflict of Laws*, p. 101.

personally present in England at the time of service of the writ. The question, however, is not always confined to the jurisdiction of the English court. If an action is brought in England upon a judgment that has been delivered abroad, or if it is claimed that the issue is *res judicata* because of a foreign judgment, the first duty of the English court is to decide whether the foreign court was competent to pass judgment, i.e. whether it had jurisdiction according to the principles of English private international law to adjudicate upon the case.

The question of choice of law. If the court decides that it possesses jurisdiction, then the next question, as to the choice of law, must be considered, i.e. which system of law, English or foreign, must govern the case? The action before the English court, for instance, may concern a contract made or a tort committed abroad, the validity of a will made by a person who died domiciled abroad, or the effect of a decree of divorce obtained in a foreign country. In each case that part of English law which consists of private international law directs what legal system shall apply to the case, i.e., to use a convenient expression, what system of internal law shall constitute the *lex causae*. English private international law, for instance, requires that the movable property of a British subject who dies intestate domiciled in Italy shall be distributed according to Italian law. Again, if two parties who were married in France become domiciled in Germany, where their marriage is annulled for a reason that would not have been sufficient in France, private international law directs that whether the annulment is effective shall be determined by German law. These rules for the choice of law, then, or *règles de rattachement* as they are called by French jurists, indicate the particular legal system by reference to which a solution of the dispute must be reached. This does not necessarily mean that only one legal system is applicable, for different aspects of a case may be governed by different laws. In fact it has been said that a case containing foreign elements is never subjected to one legal system.

'A foreign marriage is regulated as regards formal validity by the law of the place of celebration, as regards capacity to marry by the laws of the domicils of the parties. A substantial control is moreover exercised by the law of the *forum*, so that in every case at least two—the *lex fori* and one or more foreign systems—apply to different aspects of the case.'¹

¹ Unger, 19 *Bell Yard*, 17.

It must be observed that the function of private international law is complete when it has chosen the appropriate system of law. Its rules do not furnish a direct solution of the dispute, and it has been said by a French writer that this department of law resembles the inquiry office at a railway station where a passenger may learn the platform at which his train starts. If, for instance, the defence to an action for breach of contract made in France is that the formalities required by French law have not been observed, private international law ordains that the formal validity of the contract shall be determined by French law. But it says no more. The French law relating to formal validity must then be proved by a witness expert in the subject.

Private international law does not solve a case

It is generally said that the judge at the *forum* 'applies' or 'enforces' the chosen law, or alternatively that the case is 'governed' by the foreign law. These expressions are convenient to describe loosely what happens, but they are not accurate. Neither is it strictly accurate to say that the judge enforces, not the foreign law, but a right acquired under the foreign law.¹ The only law applied by the judge is the *lex fori*, the only rights enforced by him are those created by the *lex fori*. But owing to the foreign element in the case the foreign law is a fact that must be taken into consideration, and what the judge attempts to do is to create and to enforce a right as nearly as possible similar to that which would have been created by the foreign court had it been seised of a similar case purely domestic in character.²

Meaning of 'application' of foreign law

For the purposes of private international law the expression 'foreign system of law' means any system prevailing in a geographical area outside the sphere of operation of the *lex fori*. It therefore includes, not merely the law existing in a State under a foreign political sovereignty, but also the law prevailing in a subdivision of the political State of which the *forum* is part. Thus, for the purpose of private international law and so far as English courts are concerned, the law of Scotland, of the Channel Isles, of Northern Ireland, of one of the Dominions, or of a British Colony is just as much a foreign law as the law of Italy or Portugal.³

Meaning of 'foreign law'

Private international law is not the same in all countries. There is no one system that can claim universal recognition,

Private international law is different in each country

¹ *In re Askew*, [1930] 2 Ch. 259, 267.

² *Infra*, p. 35; and see Lorenzen in 20 *Columbia Law Review*, 259.

³ For a different view held in Russia see 4 *I. & C. L.Q.R.*, p. 387.

and this book is concerned solely with that which obtains in England, that is to say, with the rules that guide an English court whenever it is seised of a case that contains some foreign element. A writer on public international law may perhaps claim with some justification that the doctrines which he propounds are entitled to universal recognition. Thus, in theory at any rate, a German and a French jurist should agree as to what constitutes an effective blockade. But he who writes on private international law can make no such claim. This branch of law as found, for instance, in France shows many striking contrasts with its English counterpart, and though the English and North American rules show considerable similarity they are fundamentally different on a number of points. In England, for instance, the essential validity of a contract is determined by that system of law with which the contract has the closest connexion, but in the United States it is governed either by the law of the place where the contract was made or by the law of the place of performance. The many questions relating to the personal status of a party depend in England and North America upon the law of his domicil, but in France, Italy, Spain and most of the other European countries upon the law of his nationality. Again, so conflicting are the principles applied by the various systems of jurisprudence to questions connected with marriage, that the same two persons are frequently deemed married in one jurisdiction but unmarried in another. On the other hand, though Scottish internal law differs radically from that of England, yet the principles of private international law are so similar in both countries that an English decision is usually, though not invariably, followed in Scotland.

Methods of
avoiding
conflicts of
laws There are two possible ways in which this lack of unanimity among the various systems of private international law may be ameliorated.

Unification
of internal
laws The first is to secure by international conventions the unification of the *internal* laws of the various countries upon as many legal topics as possible. When attention is paid to the fundamental and basic differences in principle that distinguish one legal system from another, especially in the Anglo-Saxon systems as contrasted with their Continental counterparts, and when due regard is had to the modern enthusiasm for nationalism and to the recent outbreak of racialism, it is obvious that this form of unification holds out no great prospect of success. Nevertheless, a certain amount of progress has been made in the few departments of law where this unity is imperative and possible.

An important example of unification is the Warsaw Convention of 1929 which makes the international carriage of persons or goods by aircraft for reward subject to uniform rules as regards both jurisdiction and the law to be applied, and provides that any agreement by the parties purporting to alter the rules on these matters shall be null and void. The Convention has been made binding in England by the Carriage by Air Act, 1932.¹ Another example of the unification of internal laws is the Carriage of Goods by Sea Act, 1924, which has adopted for England, in common with many other nations, certain rules relating to sea transit that were formulated by the International Conference on Maritime law held at Brussels in 1922 and 1923. Again, an extensive unification of the law concerning carriage by rail was accomplished by the Berne Convention of 1924, though this, of course, is effective only on the Continent. A more ambitious scheme and one of greater importance to the mercantile community is the attempt to unify the law of bills of exchange and cheques, and also the law of sale. The Geneva Conference of 1930, attended by representatives from thirty-two countries, resulted in a convention, signed by twenty-two countries, which formulated the Uniform Law of Bills of Exchange.² Great Britain signed only a convention on stamp duties, but the importance of the unification from the British point of view is that in future the English lawyer or man of business will probably have to consider only one Continental system of law instead of a score or more.³ Mention may also be made of the Berne Convention of 1886, since amended several times,⁴ by which an international union for the protection of the rights of authors over their literary and artistic works was formed.⁵ The Council of the League of Nations entrusted to the Institute for the Unification of Private Law, established by the Italian Government in Rome, the task of indicating the lines along which ultimate unity might be attained, and a proposal for the unification of the law of sale is already in course of active preparation.⁶ On a smaller scale, the four Scandinavian

Laws of international air carriage unified

Other unifying attempts

¹ 22 & 23 Geo. V, c. 36.

² See an article by Dr. H. C. Gutteridge, K.C., in 12 *B.Y.B.I.L.* (1931), 13 et seq.

³ 12 *B.Y.B.I.L.* 18-19. The conventions have been ratified by eleven Continental countries.

⁴ See the Berlin Convention, 1908; followed by a protocol on March 20, 1914; and the Rome Convention, 1928. ⁵ See S.R. and O. 1933, No. 253.

⁶ See an article by Dr. H. C. Gutteridge, K.C., in 14 *B.Y.B.I.L.* (1933), 75 et seq. The proposal was considered by a Diplomatic Conference at The Hague

countries, Finland, Denmark, Norway and Sweden, have signed conventions unifying in those countries the law relating to bankruptcy, to *res judicata* and to the mutual recognition of judgments.

Unification
of private
international law

The second method by which the inconvenience that results from conflicting national rules may be diminished is to unify the rules of private international law, so as to ensure that a case containing a foreign element shall result in the same decision irrespectively of the country of its trial. So desirable is it to have a code of private international law common to the civilized world that several attempts have been made in the Hague Congresses on Private International Law to reduce the number of topics upon which the rules for the choice of law obtaining in different countries are in conflict. Prior to 1951 the conferences were confined to the Continental states of Europe, for, owing to the fundamental differences between the common law upon which the Anglo-Saxon systems are founded and the civil law which forms the basis of the European systems, there seemed little prospect of agreement being reached between the two groups. The British delegates, however, attended the seventh session held in 1951, no longer as mere observers but as full members of the conference.

The Hague
Conventions

Conferences were held at The Hague in 1893, 1894, 1900, and 1904 which resulted in the following six conventions:

(i) *Convention regulating the validity of marriages.*

This was adopted in 1902, but at the outbreak of war in 1939 its only adherents were Danzig, Germany, Hungary, Italy, Luxembourg, The Netherlands, Poland, Portugal, Romania, Sweden and Switzerland.¹ Moreover, in consequence of the war of 1914 and of Article 282 of the Treaty of Versailles and Article 217 of the Treaty of Trianon, the convention had ceased to operate between Germany on the one side and Portugal and Romania on the other; and also between Hungary and Portugal.

(ii) *Convention regulating the effects of marriage.*

This was signed on July 17, 1905, and dealt with the mutual in 1951. A further conference will probably be convened in 1957. For an account of the activities of the Rome Institute see 17 *B.Y.B.I.L.* (1936), 190-3, and for a survey of the work already done, *Unification of Law, 1947-52*, Rome, 1954.

Belgium withdrew in 1918, France in 1924.

rights and duties of spouses and the regulation of their proprietary interests. There were eight parties to it in 1939.¹

(iii) *Convention on divorce and separation.*

This was concluded on June 12, 1902, and had only eight adherents at the beginning of the war of 1939-45.² Switzerland withdrew in 1929, and Germany and Sweden in 1934.

(iv) *Convention on guardianship.*

This, which was also signed on June 12, 1902, has had a greater operative effect than the preceding ones. In 1939 it was in force in thirteen countries,³ and, in addition, it had been extended by the Treaty of St. Germain to Austria (who had not previously been a signatory) on the one side, and Belgium, Italy, Portugal and Romania on the other side.

(v) *Convention on interdiction.*

This deals with the committee-ship of incapable persons, but it was in force only in Danzig, Germany, Hungary, Italy, The Netherlands, Poland, Sweden, Portugal and Romania.

(vi) *Convention on civil procedure.*

As regards sphere of application this was the most successful of all the conventions, since its parties numbered twenty-two countries,⁴ though after the war of 1914 it ceased to be effective between Germany and France.⁵ It is, however, of limited application, since it does not deal with jurisdiction or choice of law but with such matters as the service of judicial and extra-judicial documents, security for costs and the taking of evidence.

¹ Danzig, Germany, Italy, Netherlands, Poland, Portugal, Romania and Sweden. France withdrew in 1916, Belgium in 1922. The convention, however, is not in force between Germany on the one side and Portugal and Romania on the other.

² Danzig, Hungary, Italy, Luxembourg, Netherlands, Poland, Portugal and Romania. France and Belgium withdrew during the war.

³ Belgium, Danzig, Germany, Hungary, Italy, Luxembourg, Netherlands, Poland, Portugal, Romania, Spain, Sweden, and Switzerland.

⁴ Austria, Belgium, Czechoslovakia, Danzig, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Jugoslavia, Latvia, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Russia and Switzerland.

⁵ A special convention, however, similar to the Hague Convention, was concluded between Germany and France in 1927. Similar conventions have been concluded since 1922 between Germany and a number of other countries, including Great Britain (1928).

The Hague
Conference of
1951

The Seventh Conference was held in 1951 and it resulted in the signing of conventions on the following four subjects:

- (i) International contracts for the sale of goods.
- (ii) The regulation of conflicts between the law of nationality and the law of domicil.¹
- (iii) The recognition of the personality of companies and other associations.
- (iv) Civil Procedure, a convention designed to replace that which was concluded in 1905.²

The Private International Law Standing Committee was instructed by the Lord Chancellor to consider whether it was desirable that Her Majesty's Government should become a party to the first two of these conventions. In their first report, issued in January 1954, the committee recommended that the convention to regulate conflicts between the law of nationality and the law of domicil should be ratified, provided that certain changes in the present law of domicil, set out in detail in the report, were first effected by legislation.³ Matters have not proceeded further at the moment. On the other hand, the committee advised that the convention to regulate international contracts for the sale of goods be not accepted and this advice has been adopted by the Government.⁴

The Hague
Conference
now put
on per-
manent
footing

A further and more decisive step taken in 1951 was the drafting of a charter designed to place the Hague Conference upon a lasting footing by the establishment of a permanent bureau. This charter has been accepted by many countries, including Great Britain, and the Bureau, consisting of a Secretary-General and two Assistant Secretaries belonging to different countries, has already been set up with its seat at The Hague. Its chief functions are to examine and prepare proposals for the unification of private international law and to keep in touch with the Council of Europe and with governmental and non-governmental organizations, such as the International Law Association. The Bureau works under the general direction of the Standing Governmental Commission of The Netherlands, which was established by Royal Decree in 1897, with the

¹ *Infra*, p. 87.

² The first two conventions have been put up for signature in France, Belgium, Netherlands and Luxembourg. The Civil Procedure convention has been put up for signature in Austria, Belgium, Italy, Netherlands, Norway, Luxembourg, Sweden, Switzerland and Denmark.

³ *Cmd.* 9068.

⁴ Hansard, House of Lords, December 13, 1955, col. 94.

object of promoting the codification of private international law.¹

As the result of conferences at Geneva in 1930 and 1931, conventions dealing with the private international law of bills of exchange and cheques were concluded, to which twenty-one European states, four South American states and Japan became parties. Geneva Conventions

In addition to the conventions mentioned above, many similar arrangements have been made between individual countries, as for example the bilateral conventions upon civil procedure concluded by Great Britain with a large number of foreign states. One of the most remarkable, and certainly one of the most interesting, of these is the Inter-Scandinavian Conventions, 1929-33, between Sweden, Norway, Denmark, Finland and Iceland. The first of these, which was signed on February 6, 1931, unifies the rules of private international law with regard to marriage, adoption and guardianship—all matters of personal status. The difficult impediment to the completion of this convention was the fact that Denmark and Norway follow the principle that the law of domicile governs most questions of a personal nature, while Sweden and Finland make nationality the determining factor. They have resolved this difficulty by agreeing to maintain their respective attitudes so far as a conflict of laws between one of the Scandinavian countries and a non-Scandinavian country is concerned, but to adopt domicile as the guiding principle in inter-Scandinavian private international law. Thus, if a person belongs to one of the four countries but has been domiciled in one of the others for two years at least, or if subjects of one of the four countries marry and establish their matrimonial domicile in one of the others, the *lex domicilii* governs questions of adoption, guardianship and marriage, including in this last case the effect of marriage on movable property.² The term of two years' domicile is intended as a safeguard against abuses, especially that of taking up residence in a neighbouring country in order to evade the sanctions of the law of nationality. Conventions between individual countries

A more recent example of a limited convention is that concluded in 1951 between the Benelux states—Belgium, The Benelux Convention

¹ Accounts of the Seventh Conference are given in 38 *Grotius Society Transactions*, 25 et seqq.; 102 *University of Pennsylvania Law Review*, 348-55; 1 *American Journal of Comparative Law*, 275 et seqq.; 79 *Clunet*, 1071-1137 (Professor Offerhaus, President of the Conference).

² The effect on immovables is governed by the *lex situs*.

Netherlands and Luxembourg—which unified the rules of private international law upon the more important matters, such as capacity and status, divorce, succession to property on death and the essential validity of contracts.¹

Influence of Permanent Court of International Justice Another agency which, to a limited extent, had a unifying influence upon the rules of private international law was the Permanent Court of International Justice.² This was the highest international tribunal in existence until the dissolution of the League of Nations, and though, of course, its decisions were not binding upon municipal courts in other disputes, it is obvious that, when it passed judgment upon a normal transaction of an essentially international nature likely to come before the courts of any country, its pronouncements deserved not merely to be respected but, other things being equal, to be followed. The outstanding instance of the influence exerted by the Permanent Court was the Serbian Loans case of 1929³ in which the question raised by France against Serbia was whether a loan issued by the Serbian Government, and mostly held by Frenchmen, was payable both as to principal and interest in paper or in gold francs. This type of question is one that affects any loan, whether issued by a Government or a private person, that contains what is called a gold clause.⁴ Such clauses, which raise a difficult question of construction, have been the subject of litigation in many different countries, and it is noteworthy that there has been a marked tendency to adopt the general principles enunciated by the Permanent Court in the Serbian case.⁵ It is only natural to presume that its successor, the International Court of Justice, will exert a similar unifying influence.

The name of the subject 'Private International Law' Though the matter seems to be of little importance, a word must be said about the name or title of the subject. No name commands universal approval. The expression 'Private International Law', coined by Story in 1834,⁶ and used on the Continent by Foelix in 1838,⁷ has been adopted by Westlake and

¹ The convention is summarized by the Dutch delegate, E. M. Meijers, in 2 *American Journal of Comparative Law*, 1 et seqq.

² See an article by Mr. W. E. Beckett, 11 *B.Y.B.I.L.* (1930), 1.

³ Publications of the Court, Series A, No. 20; see also the case of Brazilian Loans, Series A, No. 21; 11 *B.Y.B.I.L.* (1930), 17-21; 17 *B.Y.B.I.L.* (1936), 113-14.

⁴ *Infra*, pp. 251 et seqq.

⁵ See per Lord Russell of Killowen, *Feist v. Société Intercommunale Belge d'Électricité*, [1934] A.C. 161, at p. 173.

⁶ *Commentaries on the Conflict of Laws* (1st ed.), S. 9.

⁷ *University of Chicago Law Review* (Dec. 1935), p. 156.

Foote and most French authors. The chief criticism directed against its use is its tendency to confuse private international law with the law of nations or public international law, as it is usually called. There are obvious differences between the two. The latter deals mainly with the competing rights of sovereign states, the former is designed to regulate disputes of a private nature, notwithstanding that one of the parties may be a sovereign state.¹ Moreover, there is, at any rate in theory, one common system of public international law, consisting of the 'customary and conventional rules which are considered legally binding by civilized states in their intercourse with each other',² but, as we have seen, there are as many systems of private international law as there are systems of municipal law. Indeed it was this fact which made it difficult for the Permanent Court of International Justice to hold that it had jurisdiction under its statute to try the cases of the Serbian and Brazilian loans. Moreover, as often as not a question of private international law arises between two persons of the same nationality, as, for instance, where the issue is the validity of a divorce obtained by two English persons in a foreign country.

It would, of course, be a fallacy to regard public and private international law as totally unrelated. Some principles of law, such as the maxims *audi alteram partem* and *ut res magis valeat quam pereat* are common to both; some rules of private international law, as for example the doctrine of the 'proper law' of a contract, are adopted by a court in the settlement of a dispute between sovereign states;³ equally, some rules of public international law are applied by a municipal court when seised of a case containing a foreign element.⁴

An equally common title to describe the subject is 'The Conflict of Laws'. This is innocuous if it is taken as referring to a difference between the internal laws of two countries upon the same matter. When, for instance, a question arises whether the assignment in France of a debt due from a person resident in England ought to be governed by English or by French internal law, it may be said that these two legal systems are in

¹ See, e.g. *In the Estate of Maldonado*, [1954] P. 223; *infra*, p. 59.

² Oppenheim, *International Law* (7th ed.), i. 4.

³ *Serbian Loans Case*, Permanent Court of International Justice; Ser. A, No. 20/21.

⁴ e.g. the doctrine of sovereign immunity, *infra*, pp. 89 et seqq. The interaction of public and private international law has been fully canvassed by B. A. Wortley in his lectures to the Academy of International Law, published in *Recueil des Cours* (1954), pp. 245 et seqq.

conflict with each other in the sense that they can each put forward claims to govern the validity of the assignment.¹ But the title is misleading if it is used to suggest that two systems of law are struggling to govern a case. If an English court decides that the assignment must be governed by French law, it does not do so because English law has been worsted in a conflict with the law of France, but because it is the law of England, albeit another part of the law of England, i.e. private international law, that in the particular circumstances it is expedient to refer to French law. In fact, the very purpose of private international law is to avoid conflicts of law, and the one case, as Bar says, where a genuine conflict arises is where two territorial systems, differing in themselves, both seek to regulate the same matter.

Other names Other terms which have been used to describe the subject are 'International Private Law',² 'Intermunicipal Law',³ 'Comity',⁴ and the 'Extra-territorial Recognition of Rights'.⁵

The fact is that no title can be found which is accurate and comprehensive, and the two titles 'Private International Law' and 'The Conflict of Laws' are so well known to, and understood by, lawyers that no possible harm can ensue from the adoption of either of them.

¹ Holland, *Jurisprudence* (13th ed.), p. 421.

² *In re Queensland Company*, [1892] 1 Ch. 219, criticized in Holland, *Jurisprudence*, pp. 422-3.

³ Frederic Harrison, *Jurisprudence and the Conflict of Laws*, pp. 130 et seqq.

⁴ Phillimore, 'Commentaries on Private International Law or Comity'.

⁵ Holland, *Jurisprudence*, p. 398.

CHAPTER II

HISTORICAL ANTECEDENTS

1. The Roman Empire. *Pages 19-21.*
2. Fall of the Roman Empire, sixth to tenth centuries. *Pages 21-22.*
3. The period of territoriality, eleventh and twelfth centuries. *Pages 22-23.*
4. The era of the statistis, thirteenth to eighteenth centuries. *Pages 23-30.*
5. The theory of Savigny. *Pages 30-31.*
6. Modern theories. *Pages 32-39.*
7. Late development of English private international law. *Pages 39-44.*

ALTHOUGH private international law as found in this country is a substantive part of English law and is almost entirely the result of judicial decisions, its growth has been influenced to a considerable extent by the writings of jurists in other countries, and especially by the doctrines that have found acceptance on the Continent. It is still difficult to study the subject without at any rate a slight acquaintance with the general trend of Continental thought. It is therefore proposed to give here a short sketch of the historical development of this branch of law.¹

1. *The Roman Empire.*

The state of things which necessitates a system of private international law, namely, a number of conflicting territorial laws, certainly existed in the Roman Empire, but the texts do not throw a great deal of light upon the manner in which the law of Rome resolved the conflicts.

The existence of conflicting territorial laws was due to the fact that after the close of the Republic the Empire was broken

Conflicting
jurisdic-
tions under
the Empire

¹ The only separate work in English of an historical nature is *Conflicts of Laws in the History of the English Law*, by Alexander N. Sack. It is contained in *Law: A Century of Progress 1835-1935*, pp. 342-454, but it has been printed separately by the New York University Press. Beale gives a full and valuable outline of the general history of the subject in *Conflict of Laws*, pp. 1880-1975. See also Wolff, pp. 19-51; Westlake, pp. 1-22; Yntema, *The Historic Bases of Private International Law*, 2 *American Journal of Comparative Law*, 296 et seqq. The standard foreign works are Lainé, *Introduction au droit international privé*, in two volumes, and Laurent, *Droit civil international* (1880), 8 vols. The modern French authors, however, all give short historical summaries, e.g. Weiss, *Manuel de droit international privé* (1920 ed.), pp. 339-65; Valéry, pp. 8-51; Niboyet (1944), iii. 40-196; Arminjon, *Précis de droit international privé* (3rd ed., 1947), pp. 71-139; Surville, *Cours élémentaire de droit international privé*, pp. 23-52; Batiffol, *Traité élémentaire de droit international privé*, pp. 7 et seqq.

up into a number of urban communities, each of which had its own magistrates, its own jurisdiction and to a certain extent its own system of positive law. Italy, with the exception of Rome, consisted of a large number of towns, generally called municipia, while the rest of the Empire was divided into separate provinces, the constitutions of which gradually approximated to the municipal system of Italy.¹

*Origo and
domicil*

Every inhabitant was necessarily connected either with Rome or with one or more of these urban communities. The bond of connexion was either citizenship or domicil. Citizenship resulted from *origo*, adoption, manumission or election, so that it was possible for one person to be a citizen of several urban communities at the same time.² A person had his *origo* in the place to which his father, or if he was illegitimate to which his mother, belonged.³ Domicil meant the relation between a man and that urban community which he had chosen for his permanent abode, and therefore for the centre of his legal relations and his business. It was constituted by residence in a place accompanied by an intention to make the stay permanent.⁴

*Roman
rules as to
choice of
law*

Clearly, then, a person could be connected with more than one urban community at the same time, as, for instance, when he was born in one place, adopted in another and domiciled in another. The result in such a case was that he became subject to several jurisdictions, since the rule was that he might be sued before the magistrates of any urban community of which he was a citizen or in which he had his domicil. An action against a man possessing this multiple connexion would immediately raise a question of private international law, that is to say, a question of the choice of law, for though a defendant might be sued in one of several places he obviously could not be subject to different and perhaps contradictory rules of law. It is probable that as a general rule a defendant was subject to his personal law,⁵ but the question is—which system of personal law? The law of his *origo* or of his domicil?

Savigny had no hesitation in affirming that when a person had citizenship and domicil in two different places he was subject to the system of law that obtained in the place where he was a citizen and not to the law of his domicil. If he was a citizen of more places than one, the law of the place of his birth applied.

¹ Savigny, *The Conflict of Laws*, Guthrie's translation, sec. 351, p. 45.

² *Ibid.*, pp. 46–48.

³ Martin Wolff, p. 101.

⁴ Savigny, *op. cit.*, p. 54.

⁵ Westlake, p. 11.

If he was a citizen of no place, he was subject to the law of his domicile.¹

It is clear, however, that all cases where a conflict of laws arose could not be determined by the simple method of applying the personal law of the defendant. If, for instance, the dispute concerned a contract or a disposition of property in which two persons belonging to different provinces were concerned, some other rule must have existed to show what law was applicable. The texts of the *Corpus Juris* are not particularly helpful, but certain isolated rules on the subject can be discovered.² For instance, questions concerning contracts appear to have been decided according to the law of the place where the contract was made, and transactions relating to property were governed by the *lex situs*.

2. *Fall of the Roman Empire, sixth to tenth centuries.*

After the barbarians overthrew the Roman Empire and settled tribe after tribe in the territories where hitherto Roman law had run as a territorial system, there arose what is called the system of personal laws. There ceased to be a territorial law applicable to all persons living within a certain defined space. Instead, each tribe, Visigoth, Lombard, Burgundian and so on, retained its own tribal law, in much the same way as nowadays Europeans, Hindus and Mohammedans in India have their own family and religious laws.³ Savigny has described the position as follows:⁴

The era of
personal
laws

‘When the Goths, Burgundians, Franks and Lombards founded kingdoms in the countries formerly subject to the power of Rome, there were two different modes of treating the conquered race. They might be extirpated by destroying or enslaving the freemen, or the conquering nations, for the sake of increasing their own numbers, might transform the Romans into Germans, by enforcing on them their manners, constitution and laws. Neither mode, however, was followed; for although many Romans were slain, expatriated or enslaved, this was only the lot of individuals and not the systematic treatment of the nation. Both races on the contrary lived together and preserved their separate manners and laws. From this state of society arose that condition of civil rights denominated personal rights or personal laws in opposition to territorial laws. The moderns always assume that the

¹ Savigny, op. cit., p. 76.

² Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*, i. 285 et seqq.; Beale, *Conflict of Laws*, pp. 1880–5. ³ Westlake, p. 12.

⁴ Vol. i, c. 3 Cathcart's translation; and see Gibbon, *Decline and Fall of the Roman Empire*, c. xxxviii.

law to which the individual owes obedience, is that of the country where he lives; and that the property and contracts of every resident are regulated by the law of his domicile. In this theory the distinction between native and foreigner is overlooked and national descent is entirely disregarded. Not so however in the Middle Ages, where, in the same country, and often indeed in the same city, the Lombard lived under the Lombardic and the Roman under the Roman law. The same distinction of laws was also applicable to the different races of Germans. The Frank, Burgundian and Goth resided in the same place, each under his own law, as is forcibly stated by Bishop Agobardus. . . . "It often happens", says he, "that five men, each under a different law, may be found walking or sitting together."¹

There were, of course, exceptions to this system of personal or tribal laws. Criminal law and the canon law were of universal application, and there seem to have been certain matters, such as the tutelage of women, dowry and the extent of a husband's authority, which were subject to rules of general application. For the most part, however, it was necessary to discover the racial law of each party to a dispute and then to choose which of these laws was applicable.

Rules for
choice of
law

It is obvious that under this system questions must frequently have arisen bearing a close analogy to those which nowadays fall within the sphere of private international law, but the manner in which they were resolved cannot now be completely and exactly stated.² Certain rules, however, are reasonably clear. Thus the general principle was that the system of law to which the defendant was subject must prevail in every suit. Capacity to contract was governed by the personal law of each party; succession was regulated by the personal law of the deceased; a transfer of property had to comply with the formalities required by the law of the transferor; in an action of tort the law of the wrongdoer prevailed; and marriage was solemnized according to the law of the husband.

3. *The period of territoriality, eleventh and twelfth centuries.*

System of
personal
laws dis-
appears

The state of society in this period was, broadly speaking, the direct antithesis of that which had existed for the previous three or four hundred years, for the system of personal laws, which lasted till about the end of the tenth century, gradually gave way to a system of separate territorial laws. The cause of this change was not the same everywhere.

¹ Agobard became Archbishop of Lyons in 816.

² For an interesting account of the whole subject see *Étude sur le principe de la personnalité des lois depuis les invasions barbares jusqu'au XII^e siècle*, by L. Stouff.

The cause north of the Alps was the gradual transformation of society into a number of feudal units. Feudalism is the negation of personality. A Frank or a Burgundian who found himself in the position of vassal to a feudal overlord could not invoke the personal law of his race but would be obliged to recognize that he was merely the man of his lord, and as such subject to the law of his lord. This was essentially territorial, applicable without exception to all persons and to all transactions within the fief. The policy of a feudal superior was rigorously to disregard all laws save his own and to refuse protection to rights which had been acquired under an extraneous legal system. Thus, for instance, strangers were rightless. A person who passed from one fief to another was in danger of losing his property and even his freedom, and, though the treatment that he received varied infinitely in different fiefs, an almost universal burden was that he could not transmit his property on death.

Influence
of feudal-
ism

In a world which is organized on a feudal basis it is clear that there is no room for what we now know as private international law. That branch of law presupposes inter-state or international relations and the readiness of courts to apply foreign laws when necessary in the interests of justice, but feudalism recognized nothing except the local law of the land. All laws were 'real' in the sense that they were effective only within the territory of the legislator.

South of the Alps the substitution of territoriality for personality was due, not to feudalism, but to the growth of the Italian cities. The bond of union between men in Italy came to be not race, not subjection to a common feudal overlord, but residence in the same city. There gradually emerged a large number of prosperous cities, such as Florence, Bologna, Milan, Pisa and Padua, which had succeeded in winning their independence, and which not only had their own territories but also possessed laws that showed many individual variations from the generally prevailing Roman law. It was this diversity of municipal laws, combined with commerce between city and city, that demanded some respect to be paid to alien laws and that ultimately gave rise to the science of private international law.

Influence
of the
Italian
cities

4. *The era of the statisticians, thirteenth to eighteenth centuries.*

In the thirteenth century the stage upon which determined efforts were made to formulate rules for fixing the proper field of law was thus set in Italy. The feudal doctrine of the reality of

The doc-
trine of
reality be-
came un-
workable

laws became unworkable in a country like Italy, where commercial intercourse between the inhabitants of the various cities was a matter of daily occurrence. If that doctrine were to prevail, a Florentine who set foot in Bologna would be compelled to recognize the exclusive authority of the Bolognese law, since a contract made, a right acquired or a judgment delivered in Florence could have no effect in Bologna or in any other city.

The post-
glossators

It is to the credit of the jurists of those days that a search for some reasonable principle upon which these daily clashes could be composed was seriously instituted. This was the period of the renaissance of Roman law. The Italian universities were frequented by the learned from other parts of Europe and their jurists commanded a respect that is denied to their English successors in these latter days. Already the glossators of the eleventh century had done much for the revival of Roman law by the explanatory notes or *glossae* that they had added to the text of the *Corpus Juris*, but it was the post-glossators or commentators of the thirteenth century, the jurists attached to the law schools of Bologna, Padua, Perugia and Pavia, who made the first serious attempt to apply a scientific mode of reasoning to the reconciliation of conflicting laws. The method of the post-glossators was not merely to add explanatory notes to the text of the *Corpus Juris*, but to write elaborate and reasoned disquisitions upon the doctrines that were dealt with in the text. The relevance of the texts is not always apparent. Thus the post-glossators who wrote upon what we should now term private international law connected their disquisitions with the first law of the *Corpus Juris*. This was the law *De summa Trinitate et fide Catholica*, by which the Emperors Gratian, Valentinian and Theodosius had sought to compel all Roman citizens to observe the Christian faith. It began as follows:

Cunctos populos quos clementiae nostrae regit temperamentum in tali volumus religione versari, quam divum Petrum apostolum tradidisse Romanis religio usque adhuc ab ipso insinuata declarat.

There is no obvious connexion between an abstruse religious dogma and a solution of the legal problems arising from a variety of laws. Presumably the argument for connecting the two is this: since the enactment *Cunctos populos* is confined in terms to persons subject to the imperial rule and does not extend to other persons, it shows that Roman law, and therefore other laws, have a limited application. Therefore it is appropriate that any discussion as to which law applies to a dispute

between two persons subject to different legal systems should be appended to this particular enactment. The fact, of course, as Dr. Wolff has said, is that though the Italian jurists broke entirely new ground, 'they pretended that they only developed rules latent in the *Corpus Juris*'.¹ As an example of the method adopted we may cite the following gloss appended to this law of the Code by Accursius as early as 1228:²

Quod si Bononiensis Mutinae conveniatur non debet iudicari secundum statuta Mutinae quibus non subest cum dicat: quos nostrae clementiae regit temperamentum. The gloss of Accursius

If a citizen of Bologna is sued at Modena he ought not to be judged according to the statutes of Modena to which he is not subject, since it says [in the law *Cunctos populos*] 'quos nostrae clementiae regit temperamentum'.

This gloss of Accursius set the fashion, and thereafter the post-glossators always treated their remarks on the conflict of laws as a commentary on the law *Cunctos populos* of the Code.³ Pre-eminent among these jurists was Bartolus (1314-57), successively professor of law at Bologna, Pisa and Perugia, who may aptly be described as the father of private international law.⁴ He was the first man to deal with the subject on principle, and his method was to determine the province of each rule of law. His preoccupation was—'What groups of relationship fall under a given rule of law?'⁵ The eminence of Bartolus

The post-glossators originated the statute theory which became the centre of interest in this department of law for many succeeding centuries. In the Middle Ages the word 'statute' was used to indicate any law, legislative or customary, in an Italian city which was peculiar to the city and contrary to the general law prevailing in Italy, i.e. contrary to the Roman law and to the Lombardic law. In its origin the object of the statute theory was to settle conflicts which arose, first, between the statutes of the numerous cities in Italy and, secondly, between the statutes and what may be called the 'common law', i.e. the legislation that affected all the subjects of the Emperor of Germany and the King of Lombardy.⁶ Meaning of 'statute'

The post-glossators interpreted each statute in order to

¹ *Private International Law*, p. 26.

² Pillet, *Manuel de droit international privé*, ii. 338.

³ Weiss, *Manuel de droit international privé* (1920 ed.), p. 344.

⁴ See Wolff, *Bartolus of Sassoferrato*; Beale, *Bartolus on the Conflict of Laws*.

⁵ Wolff, *Private International Law* (2nd ed.), p. 24.

⁶ Pillet, *op. cit.* ii. 339.

ascertain its object and thus to fix its rightful sphere of application. This manner of approach led them to propound the following doctrine:

First, all statutes are either real, personal or mixed. A real statute is one whose principal object is to regulate things, a personal statute is one that chiefly concerns persons, while a mixed statute is one that concerns acts, such as the formation of a contract, rather than a person or a thing.¹

Secondly, these three categories of statute differ in their field of application. Real statutes are essentially territorial. They apply exclusively with regard to immovables within the territory of the enacting sovereign, but they never apply in places outside that territory.² Personal statutes, on the other hand, apply only to persons domiciled within the territorial jurisdiction of the enacting sovereign, but they remain so applicable even within the jurisdiction of another territorial sovereign. A personal statute of Florence overrides a Bolognese personal statute if a Florentine does business in Bologna, provided that the business does not relate to something that falls within the scope of a real or a mixed statute. Mixed statutes apply to all acts done in the country of the enacting sovereign, even though they raise litigation in another country.

Difficulty
of distin-
guishing
real from
personal
statutes

At first sight this classification of laws appears to afford a simple and effective solution, but the moment that we attempt to discover from the post-glossators what statutes are real and what personal we meet with the utmost confusion. The truth is, of course, that the problem is insoluble. Is, for instance, a law which regulates one's capacity to transfer land to be classified as personal because it concerns persons, or as real because it affects land? Some jurists in dealing with the subject of capacity distinguished between favourable and onerous statutes. The incapacity of infancy, for instance, which might be regarded as favourable, was to follow the person affected no matter where he went, but a law which made a person incapable of succeeding to property, being onerous, must cease to apply outside the territory of the legislator. Bartolus seems to have made the distinction between real and personal laws turn upon the grammatical construction of the enactment. A statute is real if things are mentioned first, e.g. *Bona decedentium veniant in primogenitum*; personal, if persons occupy the first place, e.g. *Primogenitus succedat in omnibus rebus*.³

¹ Some jurists defined a mixed statute as one which affected both persons and things.

² Statutes relating to movables were personal, *mobilia sequuntur personam*; Wolff, p. 24.

³ According to Beale, *Conflict of Laws*, pp. 1890-1, this was merely 'an

The difficulty was aptly described in 1729 by the French jurist Froland:¹

'I fully agree that the statute real is concerned with a thing, the statute personal has to do with the person, and the statute mixed has to do with both thing and person. . . . But with all these distinctions the difficulties which I meet hundreds and hundreds of times do not seem yet removed; and my mind, hesitating because it is not sufficiently informed, often does not know what conclusion to reach. In my opinion it is not enough to know that the statute real has to do with a thing, that the statute personal has to do with the person, and that the statute mixed has to do with both thing and person. There is another difficulty much more important to solve; that is to know when the statute does concern the thing or the person or both: and that in my opinion is the question most embarrassing and most difficult to explain; and it does not appear to me that the old writers who were contented with general definitions have given us very certain rules in this particular.'

In the sixteenth century the statute theory was carried into France, where it was developed and refined by several jurists, the most notable of whom were Dumoulin (1500-66), D'Argentré (1519-90), and Gui Coquille (1523-1603). The political organization of France rendered a study of the conflict of laws imperative. The different provinces, though politically parts of the same country as the States of America now are, each had a separate system of law, called *coutume* or custom. These customs varied in each province and therefore, owing to inter-provincial trade, were in constant conflict with each other. The jurists who wrote on the subject used the old term *statuta* to describe the customs.

The statute
theory in
France

The French jurists of the sixteenth century elaborated the statute theory and made it applicable to every legal relation. In particular, mention may be made of Dumoulin and D'Argentré. Dumoulin, described by Westlake as 'one of the greatest legal geniuses' in the sphere of private international law,² was the first exponent of the doctrine that the law to govern a contract is the law intended by the parties,³ a doctrine which, as we

The leading
French
jurists

unfortunate illustration of a distinction which was one of the most original and ingenious discoveries of the great master; a discovery which his contemporaries could not make, and his successors for 500 years failed to understand. Yet the distinction is a necessary one; a statute might well be interpreted, either as determining personal status or as affecting the inheritance of property.'

¹ This extract from his *Mémoires concernant la nature et la qualité des statuts* is the translation of Beale, *Conflict of Laws*, p. 1905. ² 7th ed., p. 17.

³ Kuhn, *Comparative Commentaries on Private International Law*, pp. 9-10; Beale, iii. 1894-5.

shall see, has been propounded in England for many years. D'Argentré, on the other hand, was essentially territorially-minded. He supported, not the autonomy of the parties, but the autonomy of the provinces.¹ He placed exaggerated emphasis upon the real statute, and although he admitted the existence of a third class, the mixed statute, i.e. one concerning both persons and things, he affirmed that it must be regarded as real. After saying that a law obtaining in the country of domicil and relating to the condition or quality of a person is a personal statute and must therefore be recognized in other countries (e.g. a rule which fixes the age of majority), he points out that some laws, although their operation appears to be confined to persons, have in reality a close connexion with property. He gives as an example a law which permits a bastard to be legitimated. At first sight the object of this is to confer family rights upon the child, but in truth it is something more than a personal law, since it carries the right of succession to the paternal property.

The statute
theory in
Holland

In the seventeenth century the Dutch jurists were chiefly responsible for the further development of the statute theory. Their fundamental principle was the exclusive sovereignty of the State. The United Netherlands consisted of a number of provinces, each with its own system of law, so that the same need arose for some body of doctrine which would enable conflicts between opposing laws to be resolved. The chief writers were Burgundus (1586-1649), Rodenburg (1618-68), Paul Voet (1619-77), Huber (1636-94), and John Voet (1647-1714).

Ulric
Huber

Huber deserves particular notice if only for the influence that he has exercised upon the development of private international law both in England and in North America. This eminent jurist laid down the following three maxims, from which he considered a sufficiently comprehensive system for the reconciliation of conflicting laws could be evolved.

- (a) The laws of a State have force only within the territorial limits of its sovereignty.
- (b) All persons who, whether permanently or temporarily, are found within the territory of a sovereign are deemed to be his subjects and as such are bound by his laws.
- (c) Every sovereign, out of comity, admits that a law which has already operated in the country of its origin shall retain its force

¹ Kuhn, *op. cit.*, p. 10. For a fuller account of him see Beale, iii. 1895-8.

everywhere, provided that this will not prejudice the subjects of the sovereign by whom its recognition is sought.¹

After pointing out in justification of the third maxim that nothing can be more destructive of international commerce than to neutralize rights validly acquired in one place merely because they are void according to a conflicting law elsewhere, Huber affirms the principle that all acts and transactions validly effected according to the law of a particular place are to be recognized as valid even in a country where the local law would render them void, but that acts and transactions effected in a place contrary to the local law, being void *ab initio*, are void everywhere.² In other words, although each State is free by virtue of its sovereignty to construct its own system of private international law, it does not in fact act arbitrarily, but on the supposed principle of comity allows the operation within its own territory of a law that has already operated elsewhere. Comity and the pressure of international commerce require that acts duly performed in one jurisdiction shall be sustained in other jurisdictions.³ Thus was launched the theory of vested or acquired rights that has played so notable a part in the writings of Dicey and other English authors.

In the eighteenth century the statute theory continued to receive attention from the French jurists, some of whom favoured the Dutch doctrine that the application of laws was limited to the territory of the legislator, while others, such as Bouhier (1673-1746), increased the scope of personal statutes and so favoured the extra-territorial operation of laws.

It is needless to discuss the theory further. It has played a great part in breaking down the doctrine of territoriality, and it has found disciples even in modern times,⁴ but it lacks a scientific basis, and affords no solid ground upon which a sound and logical system can be erected. It is impossible to disagree with the opinion expressed by a learned American judge in 1872, who said:⁵

Disappearance of the statute theory

'We are led into an examination of the doctrine of real and personal statutes, as it is called by the Continental writers of Europe, a subject

¹ For a translation of the title *De Conflictu Legum*, and for an account of Huber's influence, see an article by D. J. Llewelyn Davies, 18 *B.Y.B.I.L.* (1937), 49-78.

² Beale, iii. 1903-4.

³ 2 *American Journal of Comparative Law*, 307 (Professor Yntema).

⁴ e.g. Vareilles-Sommières, *La Synthèse du droit international privé*.

⁵ Porter J. in *Saul v. His Creditors* (1827), 5 Martin, N.S. 569, 588; Lorenzen, p. 733.

the most intricate and perplexed of any that has occupied the attention of lawyers and courts, one on which scarcely any writers are found entirely to agree, and on which it is rare to find one consistent with himself throughout. We know of no matter in jurisprudence so unsettled, or none that should more teach men distrust of their own opinions and charity for those of others.'

This is not a flattering epitaph upon a doctrine which had been developed by a series of eminent jurists with ingenuity and enthusiasm over a period of five hundred years.

5. *The theory of Savigny.*

The theory of the natural seat of a legal obligation The great German jurist, Savigny, made a decisive break with all former approaches to the subject in his book on the Conflict of Laws published in 1849,¹ in which he maintained that it was possible to construct a system of private international law common to all civilized nations. He derived little satisfaction from what had already been done. He dismissed the statute theory as being both incomplete and ambiguous and he denied the inference drawn by Huber from territorial sovereignty that a judge must apply his own law exclusively except in the case of rights already vested under some foreign law.

'This principle', he said, 'leads into a complete circle; for we can only know what are vested rights, if we know beforehand by what local law we are to decide as to their complete acquisition.'²

Savigny advocated a more scientific method. The problem, in his view, is not to classify laws according to their object, but to discover for every legal relation that local law to which in its proper nature it belongs. Each legal relation has its natural seat in a particular local law, and it is that law which must be applied when it differs from the law of the forum.³ The principal determinants of this natural seat are:

The domicile of a person affected by the legal relation.

The place where a thing, which is the object of a legal relation, is situated.

The place where a juridical act is done.

The place where a tribunal sits.⁴

¹ This was the final volume of his *System of Modern Roman Law*. It was translated into English by William Guthrie in 1869, and it is this translation that will be referred to in the following pages.

² Savigny, Guthrie's translation, pp. 102-3.

³ Savigny, op. cit., p. 89.

⁴ Ibid., p. 96.

The search for the appropriate local law must, however, be influenced by the freewill of the person interested, for in some cases, such as obligations, a party may freely submit himself to the authority of a particular legal system, while in others his submission results from his voluntary acquisition of a right. If, for example, he acquires land in a foreign country, an act which he is free to do or not to do, he must be taken to have accepted the authority of the *lex situs*.¹

The criticism that has been levelled against Savigny's theory in modern times is that it assumes the uniformity of legal relations in all systems of law.² This, as we shall see,³ is a false assumption. A person, for instance, who breaks a promise to marry another, commits a breach of contract according to most legal systems, but a tort according to others. If, therefore, the same set of facts may create either a contractual or delictual relation according to the system of law to which reference is made it is scarcely possible to determine the one natural seat of the resulting legal relation.

Objections
to Savigny's
theory

Perhaps a more apposite criticism in English eyes is that the system of private international law envisaged by Savigny is a will-o'-the-wisp, a goal easier longed for than found. Just as 500 years of argument produced no agreement upon what statutes were real and what personal, so now there are wide differences of opinion upon the most appropriate law to govern each legal relation. These juristic approaches to the subject are, in fact, incomprehensible to an English lawyer, or at any rate alien to his upbringing and traditions. As Frederick Harrison said many years ago:

'Our English conception of law, preserves us from the fantastic sophism which is current in parts of the Continent, that private international law can be erected into a uniform system by the meditations of jurists, and imposed by virtue of its logical consistency on the various tribunals of Europe.'⁴

Nevertheless, although it is true that the basis of Anglo-Saxon law is not logic but experience, it is submitted that the method adopted in practice by English courts corresponds in general with that suggested by Savigny. In the light of all the relevant circumstances, they attempt to decide each case according to the legal system to which it seems most naturally to belong.

Value of
Savigny's
views

¹ Ibid., pp. 89-90.

² *American Journal of Comparative Law*, 312.

³ *Infra*, pp. 46-52.

⁴ *Jurisprudence and the Conflict of Laws*, p. 123.

6. *Modern theories and developments.*¹

Two modern theories require a short survey.

The
theory of
acquired
rights

The first is the theory, originating with Huber, that has been elaborated in recent years by Anglo-Saxon writers, especially by Dicey in England² and by Beale in the United States of America.³ This, which is called the theory of vested or of acquired rights, is based upon the principle of territoriality. A judge cannot directly recognize or sanction foreign laws nor can he directly enforce foreign judgments, for it is his own territorial law which must exclusively govern all cases that require his decision. The administration of private international law, however, raises no exception to the principle of territoriality, for what the judge does is to protect rights which have already been acquired by a suitor under a foreign law or a foreign judgment. Extra-territorial effect is thus given, not to the foreign law itself, but merely to the rights that it has created.

‘English judges never in strictness enforce the law of any country but their own, and when they are popularly said to enforce a foreign law, what they enforce is, not a foreign law, but a right acquired under the law of a foreign country.’⁴

Support for this theory is claimed from the judgment of Sir William Scott in *Dalrymple v. Dalrymple*,⁵ where the question at issue was whether Miss Gordon was the wife of Mr. Dalrymple. Sir William Scott said:

‘The cause being entertained in an English court it must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is that the validity of Miss Gordon’s marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin.’

Insignifi-
cant value
of the
theory

This theory of acquired rights receives scant support at the present day and it has, indeed, been effectively destroyed by a learned French jurist.⁶ It no doubt stresses one of the principal objects of private international law, for, as we have already seen,

¹ For a full account of the various schools of thought see Beale, *A Treatise on the Conflict of Laws*, pp. 1924–75.

² *Conflict of Laws* (5th ed.), pp. 17, 43.

³ *Conflict of Laws*, pp. 1967–9.

⁴ Dicey, *Conflict of Laws* (5th ed.), p. 18; and see Holland, *Jurisprudence* (9th ed.), pp. 398–9; *In re Askew*, [1930] 2 Ch. 259, at p. 267, *per* Maugham J.

⁵ (1811) 2 Hag. Con. 54.

⁶ P. Arminjon, *Recueil des Cours* (1933), ii. 1–105.

one of the elementary duties of a civilized court is impartially to protect existing rights even though they originated abroad, but if it is to be regarded as the true foundation upon which that part of law is based it is open to several objections. The ambitious claim, apparently advanced by some writers, that it provides a universal doctrine by which any conflict of laws can be unerringly and logically composed, is open to several objections.

First, the theory is advanced in explanation of an imaginary difficulty, namely, that of reconciling the recognition of a foreign law with the general principle that the laws of a sovereign state have force only within its own territorial jurisdiction. But this is to ascribe too narrow a meaning to the expression 'territorial law', which is not confined to the positive rules that regulate acts and events occurring within the jurisdiction, but includes also rules for the choice of law.¹ English rules for the choice of law are part of the law of England and when a court, for instance, tests the substantial validity of a contract made by two foreigners in Paris by reference to French law, it applies a rule imposed by the English sovereign and it may accurately be described as putting into force part of the territorial law of England.

The theory misconceives the meaning of 'territorial law'

Secondly, the theory is futile if its supposed object is to indicate what legal system governs each legal relation. As Savigny has insisted, it begs the question and produces a vicious circle. A judge who is merely directed to protect a foreign acquired right is not far advanced on his journey, for he still requires to fix the particular legal system, out of perhaps several possible choices, which is entitled to determine whether acquisition is complete—a search which is not facilitated by the bald statement that a right once vested is inviolable. Once the appropriate law to govern a case has been determined, the rights that it has vested in the litigant ought certainly to be recognized as far as possible, but that fact can scarcely be called 'the foundation of judicial decisions' on private international law.² As Cook has shown, there are no fundamental and logical principles which infallibly indicate in any given situation what court has jurisdiction and what law is applicable.³

The theory begs the question

Thirdly, the theory is untrue in fact, since the rules for the choice of law current in England and North America frequently

The theory is untrue in fact

¹ Arminjon, *op. cit.*, p. 27; see also Lord Mansfield in *Holman v. Johnson* (1775), 1 Cowp. 341, 343; cited *infra*, p. 43.

² Dicey, *Conflict of Laws* (5th ed.), p. 18.

³ *Logical and Legal Bases of Conflict of Law*, pp. 18–19.

require the enforcement of a right that is unrecognized, or even repudiated, by the chosen law.¹

Rights not
recognized
abroad
sometimes
recognized
in England

A French widow, for instance, claims a share of her husband's English land. This claim raises a question either of succession or of the mutual property rights of husband and wife. If the English judge classifies the issue as one concerned with the mutual property rights of spouses he must enforce whatever right is granted to a widow by that particular part of French law. But if French law would have classified the case as one of succession, it may well be that the English judge will enforce a right that would not have been admitted in France.

The theory as advocated by Beale is open to a difficulty of a different nature. This learned writer insists that the municipal law of the country under which a right has been acquired must be followed *to the exclusion of its rules for the choice of law*. This no doubt is correct as a general principle;² but if so, the result will frequently be that the right enforced by the court of the forum will not correspond with that recognized by the relevant foreign law. The logic of the vested rights theory requires that the court of the *forum* shall apply, not merely the domestic rules, but also the rules for the choice of law, of the legal system under which the right is said to have been acquired.

If, for instance, an American citizen were to die intestate domiciled in Italy, some American courts would apply the *lex domicilii* and would grant to the relatives such rights to the movable property of the deceased as would have been granted to them by the relevant provisions of the Italian Civil Code had the deceased been an Italian with no foreign connexions. But Italian private international law, in its insistence that intestacy is governed by the *lex patriae*, would deny that the relatives possess any such rights.

Foreign
acquired
rights
sometimes
varied in
England

Again, it was said by Dicey that 'the incidents of a right of a type recognized by English law acquired under the law of any civilized country must be determined in accordance with the law under which the right is acquired'.³ This is scarcely true, for the incidents and consequences attached to a foreign right when enforced in England may differ from those recognized in its country of origin. An English court, for instance, may exact alimony from a husband living in England, although he and his wife are domiciled in a country where no such obligation is recognized.

¹ Arminjon, *op. cit.*, pp. 32-33; 47-48.

² *Infra*, pp. 61 et seqq.

³ Dicey, *Conflict of Laws* (5th ed.), p. 43, General Principle No. V.

The second and most recent theory is that which is generally called the *local law* theory.¹ This was expounded with his accustomed vigour by the late Walter Wheeler Cook, who differed from former jurists with regard to the value of so-called fundamental principles. His method, congenial to English lawyers, was to derive the governing rules, not from the logical reasoning of philosophers and jurists, but by observing what the courts have actually done in dealing with conflict of law cases. He stressed that what lawyers investigate in practice is how judges have acted in the past, in order that it may be prophesied how they will probably act in the future. A statement of law is 'true', not because it conforms to an alleged 'inherent principle', but because it represents the past, and therefore the probable future, judicial attitude.

The gist of the local law theory as formulated by Cook is that the court of the *forum* recognizes and enforces a local right, i.e. one created by its own law. This court applies its own rules to the total exclusion of all foreign rules. But, since it is confronted with a foreign-element case, it does not necessarily apply the rule of the forum that would govern an analogous case purely domestic in character, but, for reasons of social expedience and practical convenience, takes into account the laws of the foreign country in question. It creates its own local right, but fashions it as nearly as possible upon the law of the country in which the decisive facts have occurred. Pursuing a similar idea, Judge Learned Hand has said:

'When a court takes cognizance of a tort committed elsewhere, it is indeed sometimes said that it enforces the obligation arising under the law where the tort arises. . . . However, no court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by the sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs.'²

Lord Parker spoke to much the same effect in an English case:

'Every legal decision of our courts consists of the application of our own law to the facts of the case as ascertained by appropriate evidence. One of these facts may be the state of some foreign law, but it is not the

¹ Cook, *op. cit.*, especially ch. i; 41 *H.L.R.* 421; 58 *H.L.R.* 361; Stumberg, *Conflict of Laws*, pp. 7-15; 53 *L.Q.R.* 556; Falconbridge, *Conflict of Laws* (2nd ed.), pp. 30-37.

² *Guinness v. Miller* (1923), 291 Fed. 796. For the difference between this statement and the view of Cook see Cavers in 63 *Harvard Law Review*, 822.

foreign law but our own law to which effect is given, whether it be by way of judgment for damages, injunction, order declaring rights and liabilities, or otherwise.¹

Since the court of the forum adopts the view that the chosen law would have taken, not of the actual case, but of an equivalent domestic case, it does not necessarily recognize the right that would have been vested in the plaintiff according to that law. If the court of the chosen law had tried the actual case, it would not have regarded it as a domestic case. Owing to the presence of foreign elements, it would have been guided by its own choice of law rules, and therefore it might well have applied some law other than its own domestic system. Cook sums up the theory in these words:

"The forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected, the rule so selected being in many groups of cases, and subject to the exceptions to be noted later, the rule of decision which the given foreign state or country would apply, not to the very group of facts now before the court of the forum, but to a *similar but purely domestic group of facts involving for the foreign court no foreign element*. The rule thus "incorporated" into the law of the forum may for convenience be called the "domestic rule" of the foreign state, as distinguished from its rule applicable to cases involving foreign elements. The forum thus enforces, not a foreign right, but a right created by its own law."²

Local law
theory of
little
value

It is scarcely deniable, however, that this local law theory is little more than what a learned writer has stigmatized as a sterile truism—sterile because it affords no basis for the systematic development of private international law.³ To remind an English judge, about to try a case containing a foreign element, that whatever decision he gives he must enforce only the *lex fori*, is a technical quibble that explains nothing and solves nothing. It provides no guidance whatever upon the limits within which he must have regard to the foreign law. The theory, indeed, marks a retrogression from the more scientific and more satisfying thesis of Savigny.

¹ *Dynamit Actien-Gesellschaft v. Rio Tinto Co.*, [1918] A.C. 292, 302.

² *Op. cit.*, pp. 20-21.

³ Yntema, 2 *American Journal of Comparative Law*, 317.

What then is the true position as it appears to an English lawyer? What is the theoretical or doctrinal basis of English private international law? In considering its nature do we find ourselves perplexed by the enigma that apparently it subordinates the sovereignty of the *lex fori* to that of a foreign power? To answer this last question first, the position surely is that to admit the binding force of a foreign law involves no abdication of sovereignty. A legislator realizes that his own positive rules of law, though in his view best suited for matters solely connected with his own country, are not always the right and proper rules for the regulation of matters that contain some foreign element. He therefore provides his own special rules for dealing with such cases—rules which specify when his courts shall be competent to try a foreign-element case, and which indicate the particular legal system that shall guide the courts in their exercise of this jurisdiction. These rules are as much part of his own territorial law as those which regulate the conveyance of land in his own country.

Conclusion:
Territorial
sovereignty
is not
abdicated

But on what principle are the rules constructed? Is there one overriding principle from which they can all be deduced? Must they conform to a single doctrine? Are there certain maxims or axioms by reference to which the correct solution of all the diverse cases that arise in practice can be discovered? Do our difficulties disappear if we are reminded that all laws are personal, or that they are all real, or that every right duly established under the law of a civilized country must in general be sanctioned by an English judge? Clearly, such vain imaginings, such infallible nostrums, are untrue of English private international law. They are alien to the Anglo-Saxon tradition and if offered in argument would be a matter of surprise to an English judge. The English lawyer cannot but agree, at least in principle, with the teaching of Cook. His instinct is to test a proposed rule by its practical bearing upon normal human activities and expectations. It is by this method that in his opinion the purpose of law, which at bottom is to promote justice and convenience, can best be furthered. He is nothing if not an empiricist and a pragmatist. This is the spirit in which the rules for the choice of law are conceived. There is no sacred principle which pervades all decisions, but when the circumstances indicate that the internal law of a foreign country will provide a solution more just, more convenient and more in accord with the expectations of the parties than the internal law of England, the English judge does not hesitate to give

Rules for
choice of
law not
deducible
from any
one doc-
trine

effect to the foreign rules. What particular foreign law shall be chosen depends upon different considerations in each legal category. Neither justice nor convenience is promoted by rigid adherence to any one principle; it is preferable that the various principles should fit the needs of the different legal relations, and should harmonize with the social, legal and economic traditions of England. Thus, for instance, the law to govern capacity will vary according as the matter *sub judice* is a mercantile contract, a contract of marriage or a disposition of property. Again, the law to govern the interpretation of a contract is the law of the country with which the transaction has the closest connexion, but the ascertainment of this will necessitate the consideration of a variety of factors, such as the place of contracting, the place of performance, the business seats of the parties and the legal language in which the bargain is expressed. Weight is given to each factor, but none is exclusive. Private international law is no more an exact science than is any other part of the law of England; it is not scientifically founded upon the reasoning of jurists, but it is beaten out on the anvil of experience. It is difficult to disagree with the view of a learned American writer that Anglo-American tribunals have always attempted to reach a just decision in accordance with their own conceptions of utility and justice.¹

Influence
of Story

It would be ungenerous, even in an historical survey so superficial as this, to omit all mention of Joseph Story, who published his *Commentaries on the Conflict of Laws* in 1834. It is no exaggeration to say that he produced order out of almost unimaginable chaos. No comparable treatise upon the subject had previously been published in the English language. There was but a handful of English decisions. His only sources of inspiration were the confusing and conflicting disquisitions with which the Continental statutists had darkened counsel. Nevertheless his book is such a complete storehouse of the leading principles advanced by these Continental writers that it affords to the curious reader an adequate account of these uninviting materials. But the real service that Story rendered to the science of private international law was that, by the elaboration of a connected series of principles consistent with the spirit of the common law, he brought about what can only be described as the renaissance of the subject. He gave a new impulse to its study. By laying stress upon the more important conclu-

¹ Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 83 *Y.L.J.* 736.

sions of the Continental writers, he taught English lawyers that the system of private international law which they were gradually evolving could not command the respect of the world unless they relaxed somewhat their traditional ideas and considered the views of those who had laboured in a different legal atmosphere.

The defect of Story's work is his lack of discrimination. He pays excessive respect to the Continental writers, from Bartolus in the fourteenth century to Boullenois who died in 1762. At times, indeed, his commentaries produce the impression that he did not consider any statement of the law to be satisfactory unless it was accompanied by a full description of the various, and generally conflicting, theories of the statutists. He made little attempt to separate the gold from the dross, to eliminate the writers of doubtful authority or to compare the respective value of the different theories, but tossed the conflicting views together almost like the words in a dictionary.¹

Nevertheless, the extent of the influence which Story has exercised over the modern system of private international law can scarcely be overestimated.

7. *Late development of English private international law.*

When the mind dwells on the vigour and the duration of the Continental discussions, it is at first sight surprising to learn that English lawyers did not find it necessary to deal with the problem of a conflict of laws until a couple of centuries ago. Yet such is the case. There was not even an awareness of the problem in this country until the eighteenth century, it was not mentioned by Blackstone, and the middle of the nineteenth century had been reached before a connected treatise on private international law was written by an Englishman.² Professor Sack has rendered a valuable service in tracing this tardiness of development to the special features of the common law and to the English system of administration of justice.³ His explanation in brief is as follows.

History
English
private in-
ternational
law

The intra-national conflicts, that had long been inevitable on the Continent owing to the existence of different legal systems within the territory of a single nation, could not arise in England after the whole country had been brought under the sway of a single common law. International conflicts were precluded by the rule, established at an early date, that the common law

Originally
no juris-
diction at
common
law over
foreign
causes

¹ Frederic Harrison, *Jurisprudence and the Conflict of Laws*, p. 120.

² Westlake, 1858.

³ See *supra*, p. 19, note 1,

courts were unable to entertain foreign causes. This rule was the necessary result of the practice by which the members of the jury were summoned from the place where the operative facts had occurred, since their function was to decide according to their knowledge of the facts. The sheriff could scarcely summon a jury from a foreign country in which the dispute between the parties had arisen. It is true that special courts were set up to deal with cases that might contain foreign elements. The King established courts to consider complaints made by foreigners whom he had invited to England and who were therefore entitled to his protection. The staple courts and the pie-powder courts decided mercantile disputes. But in each of these cases the law administered was the law merchant, which, at any rate in theory, was regarded as a universally binding system. There was no question of applying a foreign law at variance with the law of England.

The Court
of Admiralty

When English traders began to extend their commercial activities beyond the seas, it was inevitable that they should occasionally suffer from this inability to obtain redress in respect of transactions effected abroad. A remedy ultimately became available to them in the Court of Admiralty, which extended its jurisdiction to foreign causes as early as the middle of the fourteenth century. By the middle of the sixteenth century it was competent to try disputes arising out of mercantile dealings abroad.¹ Again, however, there was no question of choice of law, for the court dispensed the general law maritime or, in cases of purely commercial matters, the general law merchant.²

In sixteenth century foreign causes, if transitory, triable at common law

By the end of the sixteenth century the common law courts had begun to compete for this jurisdiction. The technical difficulty that formerly stood in their way had disappeared, for the jury relied no longer on its own knowledge but on the testimony of witnesses. The initial step was to deal with 'mixed' cases, i.e. those in which some of the operative facts occurred in England, others abroad, as, for example, where the defendant failed to perform in Spain a charter-party that had been made in England.³ The final step, that of trying cases connected solely with a foreign country, was facilitated by the new division of actions into local and transitory. In transitory actions, i.e. where the cause of action might have arisen anywhere, there was no necessity to summon the jury from one particular neighbourhood. The plaintiff could sue the defendant where he was

¹ Sack, *op. cit.*, pp. 353-5.

² *Ibid.*, p. 355.

³ *Ibid.*, pp. 359-60.

to be found, and could lay the *venue* (i.e. the place from which the jury was summoned) where he liked. By Coke's time it was settled that the courts at Westminster could entertain all actions that were of a transitory nature, such as actions for breach of contract or upon bills of exchange, notwithstanding that any relevant fact was connected with a foreign country.¹

Thus the stage was reached at which it should have been necessary to deal with the familiar problem of choice of law. But in the case of mercantile disputes, which must have formed the bulk of those coming before the courts, the problem was avoided for many generations, since they were decided according to the general law merchant common to European nations. By the nineteenth century, when the international nature of this law had ceased and it had been incorporated as one of the municipal branches of English law, the modern doctrines of private international law had already taken root in England.² Moreover, although the common law courts had expressed their willingness to take cognizance of foreign law, they were reluctant to entertain actions in which this would be necessary.³ When the necessity became pressing, their first reaction was to require foreign cases to be tried by the appropriate court abroad, and to accompany this with a readiness to enforce the foreign judgment in England. This recognition of foreign judgments, which dates at least from 1607,⁴ has never involved a reference to the foreign municipal law. All the English courts have ever done in this connexion is to inquire whether the foreign court had jurisdiction in the international sense and whether its judgment was final.⁵

No consideration given to foreign law

The growth of the British Empire inevitably led to greater intercourse between British subjects owing obedience to a variety of laws, and consequently to an increase in the number of disputes that required, if justice were to be done, a reference to something more than the common law of England. Yet the emergence of anything approaching a connected system of private international law proved to be a slow and laborious process.

Emergence of a more rational theory in eighteenth-century cases

In *Robinson v. Bland*⁶ in 1760, the question whether a contract valid by the law of France, where it was made, though

Robinson v. Bland

¹ Ibid., pp. 370-1.

² Ibid., pp. 375-7.

³ Ibid., p. 381.

⁴ *Wier's Case*, 1 Rolle Abr. 530 K. 12, cited Sack, op. cit., p. 382.

⁵ The cases such as *Penn v. Baltimore* (1750), 1 Ves. Sen. 444, in which equity exercises personal jurisdiction in respect of acts occurring abroad, does not involve the application of foreign law; *ibid.*, p. 378, *infra*, pp. 582-91.

⁶ 2 Burr. 1077; 1 W. Bl. 234.

void by English law, could be sued upon in England was discussed but not decided. The plaintiff had lent £300 to *X* in Paris, which *X* immediately lost to the plaintiff by gaming, together with an additional £372. *X* gave the plaintiff a bill of exchange payable in England for the whole amount. It was found that in France 'money lost at play, between gentlemen, may be recovered as a debt of honour before the Marshals of France, who can enforce obedience to their sentences by imprisonment'.¹ After the death of *X* the plaintiff brought assumpsit against his administrator on three counts: on the bill of exchange, for money lent, for money had and received. It was held that the bill of exchange was void and that no action lay for the recovery of the money won at play. The plaintiff, however, was held entitled to recover on the loan. The reason for the decision given by two of the three judges was that the laws of France and of England were the same on all these points, and that therefore it was unnecessary to consider which law would apply had there been a difference between them. The judges, however, expressed their opinions on the question. Wilmut J. considered it 'a great question', but inclined to the belief that a claim contrary to public policy could not be pursued in England. Denison J. felt that English law would govern, since the plaintiff had chosen an English forum. It was left to Lord Mansfield to give a more modern flavour to the discussion.

'The general rule, established *ex comitate et jure gentium* is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception when the parties at the time of making the contract had a view to a different kingdom.'²

He amplified his remark as to the exception in these words:

'The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed.'³

This was the first mention of the doctrine that the law to govern a contract is the law intended by the parties. But what is noteworthy about the decision is that as late as 1760 the rules on so important a matter were completely unsettled.

¹ Wilmut J. described it as 'this wild, illegal, fantastical Court of Honour!', p. 1082.

² 1 W. Bl. at pp. 258-9.

³ 2 Burr. at p. 1078.

In 1775 in *Mostyn v. Fabrigas*¹ Lord Mansfield also adumbrated part of the rule that now governs liability in tort, though it was not finally settled until 1870.² He laid down that what was a justification by the *lex loci delicti* could be pleaded as a defence to an action in England.

Other principles suggested or established in the eighteenth century were that the *lex loci celebrationis* governs the formal validity of a marriage,³ that movables are subject to the *lex domicilii* of the owner for the purpose of succession⁴ and bankruptcy distribution,⁵ and that actions relating to foreign immovables are not sustainable in England.⁶ It was not, however, until nearly the close of the century that a clear acknowledgment was made of the duty of English courts to give effect to foreign laws. It was made by Lord Mansfield.

Lord
Mansfield's
statement
of principle

'Every action here must be tried by the law of England, but the law of England says that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern.'

Thus the eighteenth century represents the embryonic period of private international law, a period which extended to at least the middle of the next century. As late as 1825 Best C.J. felt justified in remarking that 'these questions of international law do not often occur',⁸ and though the era of development was at hand, a considerable time had yet to pass before the main rules were determined. Thus, although the rules to govern contracts, torts and legitimation were laid down in 1865, 1869 and 1887 respectively, it was not until 1895 that the dependence of divorce upon domicile, as regards both jurisdiction and choice of law, was established. Such matters as capacity, nullity jurisdiction and the law to govern the assignment of movables, whether tangible or intangible, are still controversial. The end of the formative period is not yet in sight. There are, in fact, many transactions and events common in daily life that are quite untouched by any but comparatively

The
nineteenth
century

¹ (1774), 1 Cowp. 161.

² *Phillips v. Eyre* (1869), L.R. 6 Q.B. 1.

³ *Scrimshire v. Scrimshire* (1752), 2 Hag. Con. 395.

⁴ *Pipon v. Pipon* (1744), Amb. 25.

⁵ *Solomons v. Ross* (1764), 1 H. Bl. 131 (N.).

⁶ *Shelling v. Farmer* (1726), 1 Strange 646.

⁷ *Holman v. Johnson* (1775), 1 Cowp. 341. Lord Stowell spoke to the same effect in *Dalrymple v. Dalrymple* (1811), 2 Hag. Con. 54, cited *supra*, p. 32.

⁸ *Arnott v. Redfern* (1825), 2 C. & P. 88.

ancient decisions, and there are many upon which the decisions are so hesitating and vacillating that it is still impossible to extract with assurance the governing principle. Moreover, the number of decisions on the subject is trifling, almost to the point of insignificance, in comparison with the case law that surrounds such topics as contracts and torts.

The older English decisions are of doubtful value An important fact, however, and one that should never be overlooked either by the student or the practitioner, is that many of the older decisions are faulty and dangerous guides, and especially so when the point at issue has been the subject of more recent adjudication. This is one sphere in which the wisdom of our elders is less sacrosanct than usual. We can affirm without exaggeration that to cite a decision upon private international law of 150 years ago is little more helpful than to search for the law of landlord and tenant in the medieval reports of the Common Pleas. In fact we can go further and say that a decision no more than seventy or eighty years old is suspect. The reason is that the time during which the courts have addressed themselves seriously to the construction of a connected series of principles is all too short for anything like a complete and comprehensive system to have yet emerged, especially when it is remembered that private international law touches every branch of law. The early judges worked on virgin soil, and their decisions were necessarily hesitating and tentative. Circumstances have necessitated a process of trial and error, and unless it is realized that the early decisions frequently represent the halting steps of pioneers it will be long before this branch of law attains a state of elegant cohesion. If we are content to justify an opinion of today upon an early decision, however precise and unambiguous, without taking into account more recent developments of the subject as a whole, nothing but confusion and chaos can ensue.

CHAPTER III

THE CONSECUTIVE STAGES IN AN ACTION INVOLVING A CONFLICT OF LAWS

Introductory. *Pages 45-46.*

1. Jurisdiction of the English court. *Page 46.*

2. Classification of the cause of action. *Pages 46-52.*

3. Selection of the *lex causae*. *Pages 52-61.*

4. Application of the *lex causae*. *Pages 61-87.*

INTRODUCTORY

IT is now proposed, before dealing with individual topics, to describe in their order of sequence the various matters that may require attention by the court in a case containing a foreign element. Stated summarily, the sequence of possible questions in such an action is as follows:

1. *Jurisdiction of the English court.*

The first and obvious essential is that the court should possess jurisdiction over both the defendant and the cause of action.

2. *Classification of the cause of action.*

Having satisfied itself that it possesses jurisdiction, the court must next determine the juridical nature of the question that requires decision. Is it, for instance, a question of breach of contract or the commission of a tort? Until this is determined, it is obviously impossible to apply the appropriate rule for the choice of law and thus to ascertain the *lex causae*.

3. *Selection of the lex causae.*

Having classified the cause of action, the next step is to select the *lex causae*, i.e. the legal system that governs the matter. This selection will be conditioned by what has aptly been called a connecting factor,¹ i.e. some outstanding fact which establishes a natural connexion between the factual

Chronology of a conflict of laws case

Jurisdiction

Allocation of the question to its correct legal category

Selection of *lex causae* based upon some connecting factor

¹ Falconbridge, 53 *L.Q.R.* 236, adopted by Robertson, *Characterization in the Conflict of Laws*, p. 92. Lorenzen, 20 *Columbia Law Review*, 268, uses the expression 'point of contact'; Unger, 19 *Bell Yard*, 3: 'elements of introduction'; Nussbaum, 40 *Columbia Law Review*, 1464: 'localizator'. The French and German expressions are *point de rattachement* and *anknüpfungspunkt*.

situation before the court and a particular system of law. The connecting factor varies with the circumstances. If, for instance, a British subject dies intestate, domiciled in France, leaving movables in England and land in Scotland, his movables will be distributed according to the law of France because of his domicile in that country, but Scots law, as being the *lex situs*, will determine the succession to the land.

4. *Application of the lex causae.*

Ambiguity
of the ex-
pression
'foreign
law'

The final step is to decide the dispute in accordance with the chosen law. This task is not always as simple and straightforward as it seems at first sight, for if a foreign law represents the *lex causae* the exact meaning to be given to the word 'law' in the context is often a matter of controversy. It may be clear, for instance, that the movables of a deceased person are to be distributed in accordance with French law, but it may not be so clear whether this direction confines the judge to the internal law of France or whether it requires him to consider the French rules of private international law. This problem necessitates an inquiry into the doctrine of *renvoi*. We will now consider these four matters in more detail.

1. *Jurisdiction of the English court*

This is the one of the four matters that must await more detailed treatment.¹ It is enough to say at this stage that the jurisdiction of the court must be available to the plaintiff and must be exercisable over both the defendant and the cause of action. As will appear later, one person, the alien enemy, has no right of recourse to the courts, while foreign sovereigns and certain other persons, such as ambassadors, are immune from the jurisdiction. Again, the general rule is that no action lies against a defendant unless he is personally present in England or unless he submits to the jurisdiction. However, despite such presence, certain proceedings affecting status, such as a petition for divorce, cannot in general be instituted unless the defendant is domiciled in England.² Finally, certain causes of action, such as trespass to foreign land, are not triable in England.³

2. *Classification of the cause of action*

Meaning of
'classification'

What is meant by the 'classification of the cause of action' is the allocation of the question raised by the factual situation before the court to its correct legal category, and its object is to

¹ *Infra*, pp. 88 et seqq. ² *Infra*, pp. 365 et seqq. ³ *Infra*, p. 561.

reveal the relevant rule for the choice of law.¹ The rules of any given system of law are arranged under different categories, some being concerned with status, others with succession, procedure, contract, tort and so on, and until a judge, seised of a foreign element case, has determined the particular category into which the question before him falls, he can make no progress, for he will not know what rule for the choice of law to apply. He must ascertain the true basis of the plaintiff's claim.² He must decide, for instance, whether the question relates to the administration of assets or to succession, for in the case of movables left by a deceased person, the former is governed by the *lex fori*, the latter by the *lex domicilii*.

This process of classification, which consciously or unconsciously must always be performed, is usually accomplished automatically and without difficulty. If, for instance, the defendant is sued for the wrongful detention in France of the plaintiff's chattels, the factual situation before the court clearly raises a question of delict. Occasionally, however, the matter is far from simple.

In the first place, it may be a case near the line in which it is difficult to determine whether the question falls naturally within this or that juridical category.

Secondly, it may be a case where English law and the relevant foreign law hold diametrically opposed views upon the correct classification. There may, in other words, be a conflict of classification, as, for instance, where a breach of promise to marry is regarded by French law as a tort, but by English law as a breach of contract.

These two difficulties are well illustrated by the historic *Maltese Marriage Case*,³ decided by the Court of Appeal at

Difficulties
that may
attend
classification

Difficulties
illustrated
by the
*Maltese
Marriage
Case*

¹ An alternative English word for classification is 'characterization'. In French it is called *qualification*. The problems that it raises, since their discovery by Kahn in 1891 and Martin in 1897, have been widely discussed both in England and abroad. The following are the chief contributions in English: 15 *B.Y.B.I.L.* 46-81 (Beckett); Robertson, *Characterization in the Conflict of Laws* (1940); Falconbridge, *Conflict of Laws*, pp. 50-123; Cook, *Logical and Legal Bases of the Conflict of Laws*, pp. 211 et seqq.; Lorenzen, 20 *Columbia Law Review*, 247 et seqq., and pp. 743 et seqq.; Unger, 19 *Bell Yard*, 6; W. R. Lederman, 29 *Canadian Bar Review*, 1-33, 168-84; Graveson, pp. 26 et seqq.; Wolff, *Private International Law*, pp. 146-67; Dicey, pp. 62-73.

² In the *estate of Musurus*, [1936] 2 All E.R. 1666, 1667 per Sir Boyd Merriam.

³ *Anton v. Bartolo*, Clunet (1891), 1171. For a fuller and more detailed account see Robertson, *Characterization in the Conflict of Laws*, pp. 158-62; 15 *B.Y.B.I.L.* 50, note 1; Wolff, op. cit., p. 149.

Algiers in 1889, which made the problem of classification a fashionable subject of study.

A husband and wife, who were domiciled in Malta at the time of their marriage, acquired a French domicil. The husband bought land in France. After his death his widow claimed a usufruct in one quarter of this land. The claim was sustainable if it was governed by Maltese law, but would fail if it were tested by French law.

There was uniformity in the rules for the choice of law of both countries: succession to land was governed by the *lex situs*, but matrimonial rights were dependent upon the *lex domicilii* at the time of the marriage.

The first essential, therefore, was to decide whether the facts raised a question of succession to land or of matrimonial rights. At this point, however, a conflict of classification emerged. In the French view the facts raised a question of succession, in the Maltese view a question of matrimonial rights.

When a conflict of this nature arises it is apparent that *if a court applies its own rule of classification*, the ultimate decision on the merits will vary according to the country in which the action is brought. On this hypothesis, the widow would have failed in France but have succeeded in Malta.¹

Upon what
principles
must classi-
fication
proceed?

The crucial question, therefore, is—upon what principles do English judges classify the cause of action? Or, to put it in another way—according to what system of law must the classification be made? Must it be made according to the internal law of England, on the ground that the internal rules and the rules of the conflict of laws in any country are based upon the same legal conceptions? It is arguable, for instance, that when English private international law submits intestate succession to movables to the *lex domicilii* of the deceased, the expression 'intestate succession' must be given the meaning that it bears in English internal law and not a more extensive meaning that may be attributed to it in the foreign domicil. In opposition to this view, which is advocated by Bartin and many other jurists, it has been suggested that classification must be based upon the 'essential general principles of professedly universal application' of analytical jurisprudence and comparative law.² To solve the problem in this scientific manner, desirable though it certainly may be, is scarcely practicable so long as agreement is lacking upon general jurisprudential principles.

¹ In fact the French court applied the matrimonial law of Malta.

² Sir Eric Beckett, 15 *B.Y.B.I.L.* 59.

It must, in fact, be admitted that classification of the cause of action is in practice effected on the basis of the *lex fori*; i.e. an English judge, by an application of the principles of English law, makes his own analysis of the question before him, and after determining its juridical nature in accordance with those principles assigns it to a particular legal category. But, since the classification is required for a case containing a foreign element, it should not necessarily be identical with that which would be congenial to a purely domestic case. Its object in this context is to serve the purposes of private international law and, since one of the functions of this department of law is to formulate rules applicable to a case that impinges upon foreign laws, it is obviously incumbent upon the judge to take into account the accepted rules and institutions of foreign legal systems.¹ It follows, therefore, that the judge must not confine himself to the concepts or categories of English internal law, for if he were to adopt this parochial attitude, he might be compelled to disregard some foreign concept merely because it was unknown to his own law. The concepts of private international law, such as 'contract', 'tort', 'corporation', must be given a wide meaning in order to embrace 'analogous legal relations of foreign type'.² In the words of one learned writer:

Classification is made on basis of English private international law

'The various legal categories, into one of which the judge must decide that the question falls before he can select his conflicts rule, must be wider than the categories of the internal law, because otherwise the judge in a conflicts question will be unable to make provision for any rule or institution of foreign law which does not find its counterpart in his own internal law, and thus one of the reasons for the existence of the science of conflict of laws will be defeated.'³

Two examples will show that English judges have been prepared to solve the problem of classification in this broad spirit.

In *De Nicols v. Curlier*:⁴

A husband and wife, French both by nationality and by domicile, were married in Paris without making an express contract as to their proprietary rights. Their property, both present and future, thus became subject by French law to the system known as *communauté des biens*. The husband died domiciled in England and left a will which disregarded his widow's rights under this French doctrine of community. The widow took proceedings in England to recover her community share.

¹ Sir Eric Beckett, 15 *B.Y.B.I.L.*

² Nussbaum, 40 *Columbia Law Review*, 1470.

³ Robertson, *op. cit.*, p. 33.

⁴ [1900] A.C. 21.

The rule of English private international law applicable to a case of this nature is that the proprietary rights of a spouse to movables are governed primarily by any contract, express or implied, that the parties may have made before marriage. Failing a contract, the rights are determined by the law of the domicile of the parties at the death of the deceased spouse. Thus the problem of classification was whether the right claimed by the widow was to be treated as contractual or testamentary, for only after that had been decided would it be possible to choose between the French law governing the contract and the English law governing testamentary questions. It was clear that in the eyes of English internal law no contract had been made, but the House of Lords held that according to French law a husband and wife are bound by an implied contract to adopt the system of community, despite the absence of an express agreement to that effect. Thus the court, by its readiness to recognize a foreign concept, widened the category of contract as understood by English internal law.

Subject
illustrated
by classification
of
proprietary
interests

A further illustration of the international spirit in which English judges fulfil the task of classification is that, when required to determine whether the *res litigiosa* is to be regarded as land and thus subject to the *lex situs*, they abandon the distinction between realty and personalty in favour of the more universal distinction between movables and immovables. As one judge remarked:

'Out of international comity and in order to arrive at a common basis on which to determine questions between the inhabitants of two countries living under different systems of jurisprudence, our courts recognize and act on a division otherwise unknown to our law into movable and immovable.'¹

Thus land in England, subject to a trust for sale but not yet sold, is regarded under the domestic doctrine of conversion as already possessing the character of personalty. If, therefore, the owner dies intestate domiciled abroad, it is arguable that he has died entitled not to land, but to pure personalty, and that the relevant intestacy rules are those of the *lex domicilii*, not of the *lex situs*. It is held, however, that his right must be classified as a right to an immovable to be governed by the *lex situs*.²

One excep-
tional case

There is, however, one type of case in which the English judge will probably not make the classification upon the basis

¹ *In re Hoyles*, [1911] 1 Ch. 179, *per* Farwell J., at p. 185.

² *In re Berchtold*, [1923] 1 Ch. 192.

of the *lex fori*. This is where the only possible *lex causae* is either the law of country *X* or the law of country *Y* and both these laws classify the question in the same manner, though in a manner different from that usual in English law.¹

Illustrations may now be given to show how various causes of action have been classified by English judges.

Examples
of classification

In the case of *In re Martin, Loustalan v. Loustalan*:²

Whether
question
matrimonial or
testamentary

A spinster, after making a will, married a man domiciled in England and subsequently died domiciled in France. By English internal law a will is revoked by marriage, but this is not so under French law.

In order to decide whether the will was revoked it was necessary to decide whether this was a matrimonial or a testamentary question, for upon this depended whether the *lex causae* was English or French. Vaughan-Williams L.J. in the Court of Appeal held that the question fell into the category of matrimonial law.

In another case:

Whether
question
one of succession
of administration

A man died domiciled in Ontario, entitled to a large block of shares in an English company. The question was whether the English administrators must sell these shares immediately, as was required by the law of Ontario, or whether, as they desired, they could avail themselves of English law and postpone the sale until a more favourable moment.³

It was necessary, therefore, to determine whether the time at which such a sale must be held is a matter that concerns succession or the administration of assets. If the former it is governed by the *lex domicilii* of the owner at the time of his death, but if the latter, it is regulated by the law of the place where the assets are situated. Farwell J. treated it as a matter of administration and therefore applied English law.

In an earlier case:

Bequest or
gift *inter vivos*

K, a man domiciled in Russia but resident in London, made a disposition of movables situated in England to take effect in favour of a certain lady, but only in the event of his death. By English law it constituted an effective *donatio mortis causae* and was valid; by Russian law it was void.⁴

¹ Robertson, op. cit., pp. 76-78; 20 *Columbia Law Review*, 281; 15 *B.Y.B.I.L.* 62.

² [1900] P. 211.
³ *In re Wilks*, [1935] Ch. 645; 17 *B.Y.B.I.L.* 214-15; *In re Kehr*, [1952] Ch. 26.

⁴ *In re Korvine's Trusts*, [1921] 1 Ch. 343. See also the New Hampshire decision in *Emery v. Clough* (1885), 63 N.H. cited Robertson, op. cit., p. 185.

Was this disposition to be classified as a gift *inter vivos* of movables and as such to be governed by the English law of the *situs*, or as a testamentary gift subject to Russian law? It was placed in the former category by Eve J., and, despite a later inconsistent decision,¹ this would appear to be the correct solution.²

3. *Selection of the lex causae*

Lex causae
depends on
a connect-
ing factor

Once the legal category has been determined the next step is to apply the correct choice of law rule in order that the *lex causae* may be ascertained. As we have seen, the correct rule will depend upon some connecting factor, such as domicile or the situation of immovables, which relates the question to a definite legal system.

X, for instance, dies intestate domiciled in France, leaving movables in England. Since, therefore, he has been connected by domicile with France, the operative rule for the choice of law is that the question of intestate succession must be governed by French law.

A connect-
ing factor
may be
interpreted
differently
in different
countries

The connecting factor that governs a given situation may well be common to several legal systems, but it occasionally happens that it is not subject to a common interpretation. It may bear a different meaning in different countries. In the hypothetical case given above, for instance, both French and English law agree that *X*'s movables must be distributed in accordance with the law of his domicile at death, but the apparent harmony is disrupted by the fact that the conception of domicile is not understood in precisely the same sense by English and French law. Whether *X* is domiciled in England or France may frequently depend upon whether the English or the French test of domicile is applied.³

Interpreta-
tion of
English
law must
prevail

Where such a conflict of views arises it is essential to decide which of the various meanings that have been attributed to a particular connecting factor must be applied. It seems obvious on principle that an English court must assign to the conception, say of domicile, that meaning which it bears in English law. The interpretation of the *lex fori* must prevail. To follow any other course would be to abandon the English rule for the

¹ *In re Craven's Estate*, [1937] Ch. 433; criticized by Falconbridge, *Conflict of Laws* (2nd ed.), pp. 644 et seqq.

² Robertson, however, is of opinion that such a gift is *sui generis*, op. cit., p. 185.

³ As, for instance, *In re Annesley*, [1926] Ch. 692, as explained *infra*, p. 76.

choice of law. English law first defines precisely what constitutes that relation with a country which is called domicile and then ordains that when a person is so related to, say, France, certain questions affecting him shall be governed by French law. Such is the appropriate law in English eyes if such is the relation. But if the court were to adopt the French meaning of domicile, according to which the *propositus* perhaps is domiciled not in France, but in England, it would be compelled to apply a system of internal law that is inappropriate according to the policy favoured in this country.¹ Practice here agrees with theory, for it is well established that English courts must ignore all foreign views and tests when required to ascertain the place of a person's 'domicil'.

Interpretation of 'domicil'

In the words of Lindley M.R.:

'The domicile of the testatrix must be determined by the English court of Probate according to those legal principles applicable to domicile which are recognized in this country and are part of its law.'²

Again, the well-established presumption of many legal systems that certain contractual matters are governed by the law of the place where the contract is made raises this problem—According to which law is the place of contract to be determined? In contracts by correspondence, for instance, the rule of English internal law is that the place where the letter of acceptance is posted is decisive, but many other systems prefer the place where the acceptance is received. There is little doubt that an English court, confronted with the problem, would apply the test of English internal law.³ This is also true where it is necessary to determine the place where a tort has been committed.⁴

Interpretation of 'place of contract'

At this stage in an action a further difficulty may arise that must be solved by a process of classification, though of a kind different from that discussed above.⁵ It may become necessary to identify the department of law under which some particular legal rule falls in order to ascertain whether it falls within the department with regard to which the *lex causae* is paramount. The *lex causae* has a certain sphere of control, i.e. it governs some, but not all, aspects of the juridical question as classified by the

Classification of a rule of law

¹ This is precisely what may happen when what is called the 'total *renvoi* theory' is applied, *infra*, p. 70.

² *In re Martin*, [1900] P. 211, 227. To the same effect, *In re Annesley*, [1926] 1 Ch. 692, 705.

³ *Infra*, pp. 225-6.

⁴ *Monro v. American Cyanamid Corp.*, [1944] K.B. 432, *infra*, p. 280.

⁵ *Supra*, pp. 46-52.

English court in the sense already indicated. Thus, for instance, in an action brought in England for breach of a contract made and performable in France, French law governs matters of formal and essential validity, but all questions of procedure are subject to English law. A French procedural rule is outside the sphere of control of the French *lex causae*. If, therefore, a particular French rule is pleaded and if it is doubtful whether it appertains to procedure or to substance, its true nature must obviously be determined. It must be ignored if it is procedural in character, otherwise it must be applied. Likewise, an English domestic rule is excluded if it appertains to form or substance, but is applicable if it is procedural in nature.

Subject of classification may be an English or a foreign rule

The critical and controversial question is the basis upon which the classification should be made, and illustrations from the authorities will now be given to show how the English judges have dealt with the matter. First, however, it is essential to appreciate that a rule either of the foreign *lex causae* or of English law itself may require to be classified and that the line of reasoning is not necessarily the same in each of these situations.

Classification of English rule illustrated by *Leroux v. Brown*¹

*Leroux v. Brown*¹ illustrates the process applied to an English rule.

An oral agreement had been made in France by which the defendant, resident in England, undertook to employ the plaintiff in France for a period longer than a year. It was admitted that the substantive validity of the contract was governed by French law and that by this law the contract was valid as to substance. The defendant pleaded, however, that a claim by the plaintiff to recover damages was unenforceable in England, since the Statute of Frauds provided that 'no action shall lie upon a contract not to be performed within the space of one year from the making thereof' unless the agreement or some note or memorandum thereof is in writing signed by the defendant.

This plea required the court to decide whether the statutory rule was of a procedural character. If so it was fatal to the plaintiff, for being a rule of English procedure it was necessarily binding in an English action. Unfortunately, the members of the court took the line of least resistance and, ignoring the larger issues involved, confined their attention to the literal wording of the statute. The reasoning of Maule J., for instance, lacked nothing in simplicity: the statute provides that no action shall be brought upon an agreement not to be performed within a year, unless it is evidenced by a written memorandum; the present agreement is of this nature and there

¹ (1852), 12 C.B. 801.

is no memorandum; 'the case, therefore, plainly falls within the distinct words of the statute'.

The defect of this reasoning lay in basing classification upon English internal law instead of upon private international law. The court failed to appreciate that the classification of the statutory rule was required for a conflict of laws case, not for a purely domestic case. The two are not *in pari materia*. The fact that a rule has been classified, or that it ought properly to be classified, in a particular way for a domestic transaction containing no foreign element, does not preclude an entirely different approach when a question of private international law is involved.¹ In this latter type of case, a condition precedent to the classification of an English rule is to ascertain the policy that the rule is designed to serve. Is it, for instance, the policy of the Statute of Frauds that no oral contract of guarantee shall be actionable in England, irrespectively of the law by which it is governed or of the country in which it is performable? Unless this is clearly the policy of the Act, it is an unfortunate application of mechanical jurisprudence to read the words—*no action shall be brought*—in a rigid and literal sense and thus to deprive the plaintiff of a right recognized as valid and enforceable by the law with which it is alone connected. To do this is to strike at the roots of private international law and to defeat one of its fundamental objects. At the present day, when the principles of this part of the law are more mature and its purpose better understood, it is believed that a court, if required to classify a rule of English law, would have regard to the foreign features of the case and would solve the problem more realistically than the Court of Common Pleas did in *Leroux v. Brown*.²

Classifica-
tion of
English
rule not
necessarily
to be based
upon inter-
nal law

The classification of a foreign rule, several examples of which are to be found in the Reports, is best introduced by reference to the controversial decision given by the Court of Appeal in *Ogden v. Ogden*.³

Classifica-
tion of for-
eign rule
illustrated
by *Ogden v.*
Ogden

A domiciled Frenchman, nineteen years of age, married a domiciled

¹ Cook, *Logical and Legal Bases of the Conflict of Laws*, pp. 211–38.

² Among other examples of the classification of an English rule see *Anderson v. Equitable Assurance of the United States* (1926), 134 L.T. 557, 566; explained Wolff, *Private International Law*, p. 159; *In re Cohn*, [1945] Ch. 5 (the Law of Property Act, s. 184, dealing with *commorientes* classified as part of the substantive, not procedural law; *infra*, p. 61); *In re Priest*, [1944] Ch. 58 (rule that a gift to an attesting witness to a will renders the gift void goes to essential validity, not to form); *In the Estate of Maldonado*, [1954] P. 223, *infra*, p. 59.

³ [1908] P. 46.

Englishwoman in England without first obtaining the consent of his only surviving parent as required by Article 148 of the French code. This article amounted to an express prohibition against the marriage of an infant without consent. The husband obtained an annulment of this marriage in a French court on the ground of want of consent. The wife subsequently went through a ceremony of marriage in England with a domiciled Englishman. In the present action, the latter petitioned for a decree of nullity on the ground that at the time of the ceremony the respondent was still married to the Frenchman.

The factual situation, therefore, raised the question of the validity of the French marriage. There were two connecting factors: the husband was domiciled in France; the marriage was solemnized in England. Guided by these factors, English private international law indicated two rules:

First, the essential validity of the marriage, including the capacity of the husband, must be governed by French law.

Secondly, the formal validity of the marriage ceremony must be tested by English law.

The sphere of control of French law was confined to the essential validity of the union. It followed, therefore, that if its rule requiring consent was to be classified as the imposition of a formality it would be disregarded, but that if its non-observance rendered the husband totally incapable of marriage it would be applied by the English court.

Foreign rule must be construed in its context and so classified

So far all is straightforward. Moreover, there is no difficulty if both English and French law agree upon the juridical nature of the consent rule and therefore upon its sphere of application. Complications arise, however, when the true nature of the rule is doubtful. The difficulty then is to discover the reasoning upon which a solution must be reached. Is, for instance, the French classification to be followed blindly? Again, is the English view of an analogous rule in the internal law of England, presuming that one exists, to be adopted? Neither alternative is satisfactory. The rational method is for the English judge to examine the rule in its foreign setting, in order to ascertain its intended scope, the policy by which it has been dictated and the part that it is designed to play by the French legislature. As one learned writer has said:

'In order to characterize the requirements of French law, the English court must examine the concrete provisions of the French law of marriage, not merely the relevant provisions as to parental consent or other alleged grounds of invalidity dissociated or isolated from their

context, but the whole title or group of chapters and articles relating to marriage.¹

Only by this process can full and proper effect be given to the English rule for the choice of law. French law, having been chosen to govern essential validity, must be allowed within reason to determine which of its domestic rules are essential rather than formal. To take the opposite course and to uphold a marriage essentially void under the personal law of the parties by attributing a merely ceremonial character to a rule regarded as essential by that law would not only be the negation of so-called comity, but would incongruously debilitate the English rule for the choice of law. The only reservation is that a foreign classification must be repudiated, if to adopt it will contravene the English doctrine of public policy or be repugnant to some fundamental principle of English law.

In such a case as *Ogden v. Ogden*, then, it is necessary to ascertain whether the foreign law, construed in its setting, prohibits a marriage without consent altogether, thus rendering it illegal, or whether in effect it merely imposes an additional formality. In short, is its object to prevent or to impede marriage? If it is prohibitory and is part of the law of the domicile,² the marriage, no matter where celebrated, should be regarded as void, for questions of legality are determinable by the law of the country with which the parties are connected by domicile. If, however, the foreign law merely imposes an impediment and does not forbid the parties to marry, it cannot affect a marriage that takes place in a foreign jurisdiction where consent is not one of the necessary formalities.³ That the French rule as it stood in 1860, thirty-eight years before *Ogden v. Ogden*, was of this formal character, is illustrated by *Simonin v. Mallac*.⁴

Prohibitory
and impedi-
mental
marriage
rules con-
trasted

Two domiciled French persons, desirous of marrying each other without obtaining the parental consent required by French law, crossed to this country and went through a ceremony of marriage in the English form, returning to Paris two or three days later. The wife subsequently petitioned the English court for a decree of nullity on the ground of want of parental consent. The French law at that date, however, did not invalidate a marriage contracted without consent. It

¹ Falconbridge, *Conflict of Laws*, p. 89.

² As to the identity of the law of the domicile in this context see *infra*, pp. 305 et seqq.

³ *The Sussex Peerage Case* (1844), 11 Cl. and F. 85; *Simonin v. Mallac* (1860), 2 Sw. and Tr. 67; 29 L.J. (N.S.) P. 97; *Steele v. Braddell* (1838), Milw. Eccl. Rep. Ir. 1; *Brook v. Brook* (1861), 9 H.L.C. 193, 216.

⁴ (1860), 2 Sw. and Tr. 67.

required the parties to ask advice of their parents by an *acte respectueux et formel*, and this *acte* had to be repeated each month for three months if the parents were adverse to the marriage. At the end of the fourth month the marriage might take place despite parental disapproval.

It was clear that absence of the consent required by this rule operated to postpone, not to prevent, the marriage. The obtaining of consent was in essence an additional formality and, since the form of the ceremony is a matter solely for the *lex loci celebrationis*, the marriage was adjudged to be valid.¹

Criticism
of *Ogden v.*
Ogden By the time *Ogden v. Ogden* was decided, however, the French rule had been altered, for it provided that:

‘The son who has not reached the age of twenty-five cannot contract marriage without the consent of his father and mother.’

Despite the obviously prohibitory character of this rule, the Court of Appeal took the view that the want of consent must be disregarded and held the marriage to be valid, since the ceremony had been performed in accordance with the requirements of English law, the *lex loci celebrationis*. The later marriage between the respondent and the Englishman was therefore bigamous. It is submitted that this case was not on the same footing as *Simonin v. Mallac*, and that it is opposed to established principles. The marriage was absolutely prohibited by the French law of the matrimonial domicil and there was no means known to that law by which the lack of consent could be cured. For the English court to classify the rule as formal was in effect to infringe the principle that the essential validity of a marriage falls to be determined by the law of the domicil.

As Lord Campbell said in an earlier case:

‘It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicil if the

¹ The so-called *Gretna Green Cases* were to the same effect. Lord Hardwicke’s Marriage Act required a marriage to be either by licence or in church after the publication of banns, but in the case of a marriage by licence it also required the consent of the father or guardian of a party under twenty-one. Thus, for the marriage in England of an infant, the formalities were either banns or licence with consent. The English courts construed this requirement of consent as a formality and held that a marriage solemnized in Scotland without consent was valid, even though the parties had gone there with the sole object of evading the English rule; *Compton v. Bearcroft* (1769), 2 Hag. Cons. 444 N. These runaway marriages have now been rendered impossible by the Marriage (Scotland) Act, 1939, s. 5, which provides that no irregular marriage by declaration *de presenti* or by promise *subsequente copula* shall be valid.

contract is forbidden by the law of the place of domicile as contrary to religion, or morality or to any of its fundamental institutions.¹

The most unfortunate feature of *Ogden v. Ogden* is its suggestion that every rule requiring parental consent to a marriage must be classified as formal.

An outstanding example of a foreign rule being construed in its context with the view of deciding whether it fell within the sphere of control of the foreign *lex causae* is afforded by *In the Estate of Maldonado*,² where the facts were these:

Classification illustrated by case of *bona vacantia*

A person died intestate domiciled in Spain leaving assets to the extent of some £26,000 in England. By Spanish law those assets passed to the Spanish State, since the deceased left no relatives entitled to take them by way of succession.

The English rule for the choice of law applicable to this factual situation is that intestate succession to movables must be determined according to Spanish law as being the *lex domicilii*. Therefore, the sphere of control of Spanish law in the instant case was confined to matters of succession, and the problem was whether the Spanish rule under which the assets passed to the State was to be classified as a rule of succession.

At this point it is pertinent to notice that, though the movables of a deceased owner who dies intestate without leaving recognized successors pass to the State in the great majority of countries, yet the capacity in which the State takes is not uniform throughout the world. In some countries, such as Italy and Germany, it is regarded as an heir taking by way of succession; in others, such as England, Turkey and Austria, it acts in its capacity as the paramount sovereign authority and confiscates the movables as being *bona vacantia*, ownerless goods.³ If, for example, the deceased dies domiciled in Turkey, the Turkish law, since it governs only questions of succession and since it does not regard the State as a successor, has no say in the matter and movables found in England pass to the Crown.⁴

¹ *Brook v. Brook* (1861), 9 H.L.C. 193. The Court of Appeal in *Ogden v. Ogden* refused to recognize the French annulment of the marriage, with the result that the parties possessed the status of married persons in England, but of unmarried persons in France. Under the modern law, however, the French decree of nullity would be recognized as valid; *De Massa v. De Massa*, [1939] 2 All E.R. 150; *Galene v. Galene*, [1939] P. 237; *infra*, p. 363.

² [1954] P. 223.

³ See Wolff, *op. cit.*, p. 157.

⁴ *In the Estate of Musurus*, [1936] 2 All E.R. 1666 (Turkey); *In re Barnett's Trusts*, [1902] 1 Ch. 847 (Austria).

The exact words of the Spanish code applicable to the facts of the *Maldonado Case* are, 'The State shall inherit' movables. Moreover, the expert evidence accepted by the court showed that in the Spanish view this was a true case of taking by way of succession, not a case of seizing ownerless goods. Thus the rule under which movables, failing relatives, pass to the State is classified as a rule of succession in Spain but as a confiscatory rule in England, and the short question was whether in an English action this foreign conception of the relationship between the State and the deceased was to prevail with regard to movables found in England. Could the *lex domicilii* dictate to the English court what meaning should be attributed to heirship?

It was argued for the Crown that the English rules of private international law are dominant so far as property in England is concerned, and that no one can be described as a 'successor' in the eyes of English law unless he has a personal *nexus* with the deceased, a connexion which certainly cannot be claimed by a sovereign State to which the property passes.

This argument, however, did not prevail. It was held, both by Barnard J. and by the Court of Appeal, that the Spanish law of the domicile, which admittedly governed all questions of intestate succession, must be allowed to determine the sense and scope of the term 'succession'.

'In examining the Spanish law in order to ascertain whether or not the State is a true heir according to Spanish law, I have accepted', said Barnard J., 'the Spanish conception of heirship, for it would be wrong in my view to apply the English conception when dealing with Spanish law; and even to try to apply the nearest English equivalent to the Spanish conception of heirship would only lead to confusion.'¹

Further, the alleged requirement of a personal *nexus* between the deceased and the heir was dismissed as a fallacy, for in the words of Jenkins L.J.:

'The heir or successor is surely the person, whether related to the deceased or not, who under the relevant law is entitled to inherit or to succeed.'²

Finally, there was nothing contrary to public policy or repugnant to English law in allowing a sovereign State to take property in the capacity of an heir.

¹ [1954] P., at p. 231.

² Ibid., at p. 249.

In an earlier case, *Uthwatt J.*, when required to decide in a case of *commorientes* whether the relevant rule of the German law of the domicil was to be applied as affecting substance or rejected as being procedural in nature, followed the same process of construing the rule in its foreign setting and in the result accepted the German classification.¹

Classification of rule of *commorientes*

There is no need at this stage to discuss other cases in which English courts have classified foreign rules, since examples will appear from time to time in the course of the following pages.²

4. *Application of the lex causae*

This chronology of an action raising a question of private international law has now reached the final stage. Nothing remains but for the judge to apply the *lex causae*. At first sight this seems to be a comparatively simple task, since presumably all that is required is to give effect to the appropriate internal law rule of the *lex causae*. If, for instance, a man has died intestate leaving movables in England, it seems obvious that if he died domiciled in England the rules of distribution contained in the Administration of Estates Act must be applied, and equally obvious that if his last domicil was in Italy effect must be given to the equivalent rules of the Italian civil code. But the life of the law has not always been the obvious. To appreciate this fact, however, it is necessary to consider the matter according as the *lex causae* is English or foreign.

What is the scope of the *lex causae*?

A. Construction of the *lex causae* when it is English.

In this case, the obvious represents the law. It is the appropriate rule of English internal law that must be applied to the case. Thus if, in the example given above, the deceased died domiciled in England, the scheme of distribution imposed by the Administration of Estates Act must be followed. There can be no question of paying any further regard to the private international law of England. The function of that department

Internal law applied if *lex causae* is English

¹ *In re Cohn*, [1945] Ch. 5.

² *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 877, *infra*, p. 664 (whether a French rule affected procedure or the substantive law of tort); *In re Doetsch*, [1896] 2 Ch. 836 and other similar cases, *infra*, p. 663 (whether a rule regulating the order in which parties must be sued affected procedure or substance); *Huber v. Steiner* (1835), 2 Bing. N.C. 202 and other similar cases, *infra*, p. 653 (whether a statute of limitation goes to substance or procedure); *Huntington v. Attrill*, [1893] A.C. 150, *infra*, p. 136 (whether a New York statutory rule was penal or remedial).

of the law is purely selective and its selection of English law as the *lex causae* must perforce refer to English internal law, i.e. to the rules applicable to a purely domestic situation having no foreign complexion.

B. Construction of the *lex causae* when it is foreign.

1. *The question theoretically considered*

The problem that arises if *lex causae* is foreign

The selection of a foreign *lex causae* creates a more complex situation. The difficulty is to determine the sense in which the *lex causae* must be understood. If, for example, the English rule for the choice of law refers to the law of Italy, what meaning must be attributed to the 'law of Italy'? The difficulty is not obvious at first sight, and we may lament in passing that it has become so controversial, but it can be demonstrated by a few simple illustrations.

The difficulty illustrated

X, a British subject, dies intestate, domiciled in Italy, and an English Court is required to decide the mode in which his movables found in England shall be distributed.

It is obvious in theory that the mode of distribution should be the same everywhere, in the sense that no matter what national court deals with the matter there ought to be universal agreement as to what particular legal system shall indicate the actual beneficiaries. The fact, however, that there are different systems of private international law militates against this ideal solution. Thus, according to the English rules for the choice of law the question of intestate succession to movables is governed by Italian law as being the *lex domicilii* of X at the time of death, but according to the Italian rules it must be referred to the law of England as being the *lex patriae*. In the case given above, for instance, an English court has no option but to refer the question of succession to Italian law, while an Italian judge if seised of the matter is under an equal necessity to apply the national law. The English judge, of course, is exclusively governed by his own system of private international law, and must therefore decide that X's goods shall be distributed according to Italian law. Despite this obvious conclusion, however, we are still confronted with the question—what is meant by Italian law? Does it mean Italian internal law, i.e. the rules enacted by the Italian Code analogous to section 46 of the Administration of Estates Act, 1925, which regulate the distribution of an intestate's property? Or does it mean the whole

of Italian law, including in particular the rules of private international law as recognized in Italy? If the latter is the correct meaning, a further difficulty is caused by the difference between the English and Italian rules for the choice of law, for upon referring to Italian private international law we find ourselves referred back to English law. This being so, the question is whether we are to ignore the divergent Italian rule or to accept the reference back that it makes. If we accept the reference back, are we to stop finally at that point and to distribute *X*'s goods according to the Administration of Estates Act?

The difficulty may arise in an action for breach of contract. For instance:

By a contract made at Hamburg in German form containing expressions peculiar to German law, a merchant, resident in Hamburg, agrees to sell goods f.o.b. Hamburg to a London merchant. The purchaser brings an action in England to recover damages for short delivery. Difficulty further illustrated

There is no doubt that private international law as established in this country requires the rights of the parties to be determined according to German law. But is German law in this connexion to be understood as excluding or including its rules for the choice of law? If it is taken to include those rules, the English court may possibly find that Germany has a different principle of private international law according to which the merits of the dispute fall to be decided by English law.

When a case is complicated in this fashion, owing to a difference in the private international law of two countries, there are three possible solutions. These are as follows: Possible solutions

The judge who is seised of the matter and who is referred by English private international law to, say, the law of France, may

- (i) take 'the law of France' to mean the internal law of France; or
- (ii) decide the case on the assumption that the doctrine of *renvoi* is recognized by English law; or
- (iii) take 'the law of France' to mean the law which a French judge would administer if he were seised of the matter.

These possible courses will now be discussed with the view of showing that, at least in certain types of case, the third solution has rightly or wrongly been frequently adopted by the judges.

The first solution, and the one which in the present submission is in general correct and desirable, is to read the expression 'the law of a country' as meaning only the internal rules of that 1. Court may look to internal law only

applicable to such a case is that capacity must be determined by Italian law, but Italian private international law refers the question to French law as being the *lex patriae*. This form of reference from *B* to *C* is called *Weiterverweisung* in Germany. Perhaps the best English equivalents of the two forms are *remission* and *transmission*.¹

This form
of *renvoi*
not part of
English
law

This particular doctrine of *renvoi*, whether in the form of remission or transmission, which is now generally called *partial renvoi*,² is not part of English law.³ That is to say, if English law refers a matter to the *lex domicilii* and if the latter remits the question to English law, the judge does not automatically accept the remission and apply English internal law. He does not act as the French court did in *Forgo's Case*. It seems unnecessary, therefore, to elaborate the objections to which the doctrine is open.

3. The for-
eign court
doctrine
may be
adopted

The third possible solution is to adopt what may be called the *foreign court theory* or the doctrine of *double renvoi*⁴ or *total renvoi*,⁵ or 'the English doctrine of *renvoi*'. This demands that an English judge, who is referred by his own law to the legal system of a foreign country, must apply whatever law a court in that foreign country would apply if it were seised of the matter. The question, for instance, concerns the testamentary dispositions of a British subject who dies domiciled in Belgium, leaving assets in England. A Belgian judge dealing with this matter would be referred by his private international law to English law, but he would then find that the case was remitted to him by English law. Evidence must therefore be adduced in the English proceedings to show what he would in fact do. He might accept the remission and apply his own internal law, and this would be his course if *renvoi* in the *Forgo* sense (*partial renvoi*)

¹ The literature on the subject is immense; among the contributions in English see: Bate, *Notes on the Doctrine of Renvoi*; Mendelssohn-Bartholdy, *Renvoi in Modern English Law*; Rabel, i. 70 et seq.; 10 *Columbia Law Review*, 190, 327; 24 *L.Q.R.* 133 and 26 *L.Q.R.* 91; Falconbridge, *Conflict of Laws* (2nd ed.), pp. 137-263; 27 *Y.L.J.* 509 and 31. 191; 31 *Harvard Law Review*, 523 and 51. 1165; 16 *B.Y.B.I.L.* 36 and 18. 32; 87 *University of Pennsylvania Law Review*, 1; 6 *Vanderbilt Law Review*, 708; 29 *Tulane Law Review*, 379 et seq.; Dicey, *Conflict of Laws*, p. 48. Especial reference should be made to Wolff, p. 186.

² Dicey, p. 50.

³ *In re Askew*, [1930] 2 Ch. 259, 268. 'An English court can never have anything to do with it [*renvoi*], except so far as foreign experts may expound the doctrine as being part of the *lex domicilii*', per Maugham J.

⁴ Rabel, i. 76.

⁵ Dicey, p. 51; Falconbridge, op. cit., p. 170.

is recognized in Belgium, or he might reject the remission and apply English internal law. Whatever he would do inexorably determines the decision of the English judge. The present solution, as described by Sir H. Jenner over a hundred years ago, requires the court to 'consider itself sitting in Belgium under the particular circumstances of the case'.¹ The same judge said in another passage:

'The court sitting here decides from the persons skilled in that [Belgian] law, and decides as it would if sitting in Belgium.'²

If this third solution is adopted, it is vital to realize that the decision given by the English judge will depend upon whether the doctrine of *partial renvoi* is recognized by the particular foreign law to which he is referred. The doctrine, for instance, is repudiated in Italy but recognized in France. Therefore, if the issue in England is the intrinsic validity of a will made by a British subject domiciled in Italy, the judge, if he is to make an imaginary judicial journey to Italy, will reason as follows:

Variable
operation
of the
doctrine

An Italian judge would refer the matter to English law, as being the national law of the *propositus*. English law remits the question to Italian law as being the *lex domicilii*.

Italian law does not accept this remission, since it repudiates the *partial renvoi* doctrine.

Therefore an Italian judge would apply English internal law.³

A French domicil, however, would produce the opposite result, since a court sitting in France would accept the remission from England and would ultimately apply French internal law.⁴ In other words the English rule for the choice of law is a capricious guide, since its operation is made to depend upon the views, often incalculable, of foreign jurists.

This third solution does not lack support in England and North America. Certain English decisions, which will be discussed later, may be cited in its favour; throughout his life Dicey maintained its truth; the learned editor of his fifth edition

Advocates
of the
foreign
court
doctrine

¹ *Collier v. Rivaz* (1841), 2 Curt. 855, at p. 859, *per* Sir Herbert Jenner.

² *Ibid.*, at p. 863. The doctrine is ambiguous in the sense that the grounds upon which the English judge must arrive at the Belgian decision are far from clear. Must he reason on the basis of the actual circumstances of the case, especially the presence of the assets in England? Or, must he reason on a false assumption, namely, that the assets are in Belgium? There is judicial authority for both views. See Dobrin, 15 *B.Y.B.I.L.* 37-45.

³ *In re Ross*, [1930] 1 Ch. 377; *infra*, p. 79.

⁴ *In re Annesley*, [1926] Ch. 692, *infra*, p. 76.

was equally strong in advocating its merits;¹ and a modern American jurist sums up his conclusions in these words:

‘When a court is referred by its own conflicts rule to a foreign law, it should, as a matter of course, look to the entire foreign law as the foreign court would administer it.’²

The doctrine is of doubtful value Before estimating the value of the English decisions, therefore, it is appropriate to consider a few of the objections that may be raised to this foreign court doctrine. The burden of the following pages is that it is objectionable in principle, is based upon unconvincing authority and cannot be said to represent the general rule of English law. It is submitted that, subject to certain well-defined exceptions, an English judge, when referred by a rule for the choice of law to the legal system of a foreign country, is not required to consider whether the *renvoi* doctrine is recognized by the private international law of either country, but must administer the internal law of the legal system to which he has been referred.

The following objections, amongst others, may be directed against the doctrine:

Uniformity not attained if the doctrine is accepted in both countries (a) *The foreign court doctrine does not necessarily ensure uniform decisions.* The laudable objective of those who favour the doctrine either of partial or of total *renvoi* is to ensure that the same decision shall be given on the same disputed facts, irrespective of the country in which the case is heard. In truth, however, the doctrine of *renvoi*, in whatever form it is expressed, will produce this uniformity only if it is recognized in one of the countries concerned and rejected in the other—not if it is recognized in both. If, for example, the *lex domicilii*, to which the English judge is referred, ordains that the case is to be decided exactly as the national (English) court would decide it, what is the judge to do upon finding that by English law his decision is to be exactly what it would be in the country of the domicile?³ Where is a halt to be called to the process of passing the ball from one judge to another? There is no apparent way in which this inextricable circle can be broken—this international game of lawn tennis be terminated.

‘No logical reason can be given why if in the one case Massachusetts law be taken to refer to the French conflict-of-laws rule, the latter should not in turn be held to refer back again to the Massachusetts conflict-of-laws rule, and so on *ad infinitum*.’⁴

¹ Dicey and Keith, *Conflict of Laws* (5th ed.), pp. 863 et seqq.; ²⁴ *Journal of Comparative Legislation*, 69.

² Griswold, 51 *H.L.R.* 1183.

³ 18 *B.Y.B.I.L.* 37.

⁴ Schreiber, 31 *H.L.R.* 533.

Uniformity will, indeed, be attained if the *lex domicilii* repudiates the doctrine of total *renvoi*, i.e. if, instead of seeking guidance from a foreign judge, it categorically provides that the national (English) law shall govern the matter, for in this case English internal law will apply and harmony will prevail. It is true that the foreign court doctrine is apparently unrecognized in countries outside the British Commonwealth, but none the less it is difficult 'to approve a doctrine which is workable only if the other country rejects it'.¹ The fact is, of course, that uniformity of decisions is unattainable on any consistent principle with regard to matters that are determined in some countries by the *lex patriae*, in others by the *lex domicilii*.²

A second obstacle to uniformity of decisions is that the foreign court doctrine does not require, in fact does not allow, the English judge to don the mantle of his foreign colleague until he himself has classified the cause of action.³ But to delay his transmigration so long may well result in a decision that would have been incomprehensible to the hypothetical foreign judge.

Uniformity may be lost, since theory does not apply to classification

If, for instance, the English judge classifies the juridical question as one concerning the essential validity of a will left by a British subject who died domiciled in Italy, he will defer to the decision that would be given in such a case by an Italian judge. In the result he will apply English internal law.

But suppose that an Italian judge would have classified the question as one concerning the marital rights of the testator and his wife, who were both domiciled in Germany at the time of their marriage. In these circumstances he would have referred to the internal law of Germany as being the law of the matrimonial domicil.⁴

On this hypothesis, there is nothing but discord between what the English judge has done and what his Italian counterpart would have done.

Admittedly, it would be heresy for the English judge to classify the cause of action in a manner radically opposed to the

¹ Lorenzen, 50 *Y.L.J.* 753.

² Rabel denies this. He says that if the world is split into two contradictory systems, some applying the principle of domicil, others the principle of nationality, to govern certain matters, then it stands to reason that *renvoi*, which supplies a reasonable *modus vivendi*, cannot be applied in the same manner by the two antagonistic groups and at the same time reach uniformity. 'The English method in turn is not to be observed by courts following the nationality principle. Theorists should not demand schematic symmetry just to obtain an *argumentum ad absurdum*.' *The Conflict of Laws, A Comparative Study*, i. 77.

³ As to this see *supra*, pp. 46 et seqq.

⁴ Cp. the *Maltese Marriage Case*, *supra*, p. 47.

conceptions of his own law, but nevertheless it would seem that the foreign court doctrine, if it is to be consistent, should not arbitrarily fix the stage at which alien intervention is to occur, but should go the whole way and require every phase of the action, except procedure, to be tested according to the foreign standards.

The doctrine conflicts with the object of a rule for the choice of law (b) *The foreign court doctrine signifies the virtual capitulation of the English rules for the choice of law.* Stripped of its verbiage, the doctrine involves nothing less than a substitution of the foreign for the English choice-of-law rules. In the case, for instance, of the British subject who dies intestate domiciled in Italy, the English rule selects the law of Italy as the *lex causae*, but the equivalent Italian rule selects the law of England. When, therefore, the English judge defers to the decision that an Italian judge would have given, he applies the internal law of England and thus shows a preference for the Italian selective rule. The English rule is amended, since it does not meet with the approval of the law-maker in Italy. This, indeed, is the apotheosis of comity. In fact, it comes perilously near to a surrender of legislative sovereignty.¹ Moreover, a rule for the choice of law is essentially selective in nature,² and that it should have no other effect than to select another and contradictory rule of selection savours of incompatibility and paradox.

The doctrine conflicts with the policy of a rule for the choice of law One acute critic, indeed, finds nothing strange in this surrender to a foreign rule for the choice of law.³ He denies that there is any logical reason why an English rule of this nature should not be taken to indicate the private international law of a foreign country rather than its internal law. To regard a reference to the *lex domicilii* as a reference to the internal law is, he says, merely to beg the question. This argument, it is submitted, ignores both the nature and genesis of a rule for the choice of law. The material fact is that such a rule is based upon substantial grounds of national policy. It represents what appears to the enacting authority to be right and proper, having regard to the sociological and practical considerations involved. The English principle for instance, that an intestate's movables shall be distributed according to the law of his last domicil is founded on the reasoning that rights of succession should in the nature of things depend upon the law of the country where the deceased established his permanent home.

¹ See the dissenting judgment of Taschereau J. in the Canadian case of *Ross v. Ross* (1894), 25 Can. S.C.R. 307. See Schreiber, 31 *H.L.R.* 561-4.

² Schreiber, *op. cit.*, p. 533.

³ Griswold, 51 *H.L.R.* 1176-8.

Having voluntarily become an inhabitant of the country, it is the view of English law that in this matter he should be on the same footing as other inhabitants. Moreover, the natural inference is that he submits himself to the law which binds his friends and neighbours. This would seem to be his presumed intention. Thus, if the reference to the *lex domicilii* is regarded as a reference to whatever internal system the private international law of the domicil may choose, then not only is the deliberate policy of English law reversed, but the probable intention of the *propositus* is ignored. Indeed, his expectations may be flouted. He may, for instance, have refrained from making a will, having been content with the local rules governing intestacy, the purport of which it will have been a simple matter for him to ascertain. A quite different set of rules, however, may operate if the private international law of his domicil is to have effect.

(c) *The foreign court doctrine is difficult to apply.* The doctrine obliges the English judge to ascertain as a fact the precise decision that the foreign court would give. This confronts him with two difficulties.

First, he must ascertain what view prevails at the moment in the foreign country with regard to the doctrine of *partial renvoi*.

Secondly, where the foreign rule for the choice of law selects the national law of the *propositus*, the judge must ascertain what is meant by national law.

As we have already seen, the *lex causae* that emerges from an application of the doctrine depends *inter alia* upon whether the doctrine of the *partial renvoi* is recognized by the *lex domicilii*.¹ If the court of the domicil would accept the remission made to it by English law, it would determine the case according to its own internal law; otherwise it would apply the internal law of England. This dependence of the rights of the parties upon the attitude of the *lex domicilii* to the *renvoi* doctrine is a cause of acute embarrassment. There are few matters upon which it is more difficult to obtain reliable information. In Continental countries the views of the jurists upon the doctrine not only change from year to year but are frequently divergent at any one time, and little reliance can be placed upon the decisions of the courts, for, owing to the absence of the principle *stare decisis*, what is decided by one court today is disavowed by another tomorrow.² One result is that an undue

Difficulty of ascertaining foreign view of *renvoi*

¹ *Supra*, p. 67.

² See *per* Maugham J., *In re Askew*, [1930] 2 Ch. 259, 277-8.

influence is possessed by the expert witness. He may be an over-zealous partisan of one school or the other, or, though learned in the internal law of the domicile, he may be unacquainted with the niceties of the *renvoi* doctrine.¹ 'It is surprising', says one writer, 'to see how often judgments of the German Supreme Court which are freely criticized in Germany as bad law and are in contradiction with the authorities there, are quoted by expert witnesses as if they constituted the law of the land.'² The result is that the English judge may be confronted with a somewhat arduous and invidious task, as witness the following remarks of Wynn Parry J. in a modern case:

'It would be difficult to imagine a harder task than that which faces me, namely, of expounding for the first time either to this country or to Spain the relevant law of Spain as it would be expounded by the Supreme Court of Spain, which up to the present time has made no pronouncement on the subject, and having to base that exposition on evidence which satisfies me that on this subject there exists a profound cleavage of legal opinion in Spain and two conflicting decisions of courts of inferior jurisdiction.'³

Difficulty
of deter-
mining the
national
law of the
propositus

The second difficulty that may arise is to ascribe a definite meaning to the expression 'national law'. When the private international law of the country in which the English judge is presumed to sit selects the nationality of the *de cujus* as the connecting factor, it becomes necessary to correlate the national law with some precise system of internal law by which the issue before the court may be determined. This is a simple matter when the *de cujus* is a national of some country, such as Sweden, which has a unitary system of territorial law.⁴ There is a single body of internal law applicable throughout the territory known as Sweden. The position is far different where the country of nationality comprises several systems of territorial law, as is true of the British Empire and the United States of America. What, for instance, is the national law of a British subject? The expression is, of course, meaningless, for the law that governs a British subject in personal matters varies according to the unit of the Empire or to the foreign country in which he is domiciled. It is one system in England, another in

¹ 19 *Canadian Bar Review*, 316.

² Mendelssohn-Bartholdy, *Renvoi in English Law*, p. 29, note 1.

³ *In re Duke of Wellington*, [1947] Ch. 506, 515; *infra*, p. 83.

⁴ For a stimulating *exposé* of the present difficulty see Falconbridge, *Conflict of Laws* (2nd ed.), pp. 202-16. See also a note by J. H. C. Morris, 56 *L.Q.R.* 144-7.

Scotland, and so on. The most recent case, *In re O'Keefe*,¹ in which the problem arose will serve to illustrate both the insuperable nature of the difficulty and the speciousness of the foreign court doctrine. The facts were these:

The question before the English court was the mode in which the *In re O'Keefe* movables of *X*, a spinster who died intestate, were to be distributed. *X*'s father was born in 1835 in what is now called Eire, but at the age of 22 he went to India, and except for various stays in Europe lived there throughout his life and died in Calcutta in 1885. *X* was born in India in 1860; from 1867 to 1890 she lived in various places in England, France and Spain; but in 1890 she settled down in Naples and resided there until her death 47 years later. About the year 1878 she had made a short tour in Eire with her father. She never lost her British nationality, but it was held that she had acquired a domicile in Italy.

The law selected by English private international law to govern the question of distribution was, therefore, the *lex domicilii*. An Italian judge, however, had he been seised of the case, would have been referred by the Italian Civil Code to the national law of *X*. He would have rejected any remission made to him by the national law, since the *partial renvoi* doctrine is not adopted in Italy. The Civil Code uses the general expression 'national law' and fails to define what this means when the country of nationality contains more than one legal system. Which system of internal law, then, out of those having some relation to *X*, would be regarded by an Italian court as applicable? The issue raised by the summons was whether it was the law of England, of Eire or of British India. Which of these systems would be selected by a court in Italy? The expert witnesses agreed that it would be the law of the country to which *X* 'belonged' at the time of her death. She certainly did not 'belong', whatever that may mean, to England in the sense of attracting to herself English internal law, for she had spent no appreciable time in the country, and, as Pollock once remarked, English law has no especial predominance in the British Empire.² She might perhaps, by reason of her birth in Calcutta, be regarded as belonging to India, though she had not been there for seventy years. The man on the Clapham bus might even be excused for thinking that she most properly belonged to the country where she had continuously spent the last forty-seven years of her

¹ [1940] Ch. 124.

² 25 *L.Q.R.* 157; also an editorial note in *In re Ashew*, [1930] 2 Ch. at p. 269.

life.¹ Crossman J., however, would have none of these. He reverted to X's domicil of origin, and held that she belonged to Eire because that was the country where her father was domiciled at the time of her birth. In the result, therefore, the succession to her property was governed by the law of a country which she had never entered except during one short visit some sixty years before her death; which was not even a separate political unit until sixty-two years after her birth; of whose succession laws she was no doubt profoundly and happily ignorant; and under the law of which it was impossible in the circumstances for her to claim citizenship. The convolutions by which such a remarkable result is reached are interesting. First, the judge is referred by the English rule to the *lex domicilii*, which in the instant case means the law of the domicil of choice; then he bows to the superior wisdom of a foreign legislator and allows the *lex domicilii* to be supplanted by the *lex patriae*; then, upon discovering that the *lex patriae* is meaningless, he throws himself back upon the domicil of origin, and thus determines the rights of the parties by a legal system which is neither the national law nor the *lex domicilii* as envisaged by the English rule for the choice of law.

Comment is surely superfluous. A decision that is so out of touch with the realities of life and so calculated to defeat the expectations of the deceased is scarcely a good advertisement for the foreign court doctrine.²

2. *The English decisions*

The following cases are generally cited in support of the foreign court doctrine.

Collier v. Rivaz:
formal
validity of
a will

Collier v. Rivaz.³ The facts here were as follows:

A British subject, who according to English law was domiciled in Belgium at the time of his death, had executed seven testamentary instruments, a will and six codicils. The will and two of the codicils had been executed in accordance with the formalities required by Belgian internal law. The remaining four codicils, though formally valid according to the Wills Act, 1837, were not made in the form

¹ Morris points out (56 *L.Q.R.* 146) that the summons did not suggest Italian law as a possible choice, and he assumes that the decision is no authority against the view that the internal law of the domicil should have been applied.

² The difficulty of identifying the law to which a British national is subject was ignored in *In re Ross* (*infra*, p. 79) and *In re The Duke of Wellington* (*infra*, p. 83). In both cases English law was chosen without argument.

³ (1841), 2 Curt. 855.

required by Belgian internal law. According to the law of Belgium the testator had never acquired a domicile in that country, since he had not obtained the necessary authorization from the Government. The question was whether the instruments could be admitted to probate in England.

Sir Herbert Jenner, after propounding the theory that he must sit as a Belgian judge, admitted the will and two codicils to probate because they satisfied the formalities of the internal law of the country in which the testator was domiciled in the English sense; and he extended the same indulgence to the remaining codicils on the ground that, since the testator had not acquired a domicile in Belgium in the Belgian sense, a judge in Brussels would apply Belgian private international law, under which the formal validity of the instruments would be tested by English internal law.

This decision is open to many criticisms.¹ It is obvious that when a rule for the choice of law selects a particular legal system as the one to govern a given question, it is necessary to decide whether this means the internal law or the private international law of the selected system. It cannot mean both, for the private international law may indicate some other legal system, the internal law of which differs from the internal law of the selected system. If the question in *Collier v. Rivaz* had been, not the formal, but the intrinsic, validity of the testamentary instruments, if, for instance, some of them had been lawful by English internal law but unlawful by Belgian internal law, while others had been lawful in Belgium but unlawful in England, it would have been impossible to uphold them in their totality. Sir H. Jenner, however, had it both ways. He held that the formal validity of a will cannot be denied if it satisfies either the internal law or the private international law of the selected legal system. There is much to be said for this benevolent rule in the one case of formal validity, since it is obviously desirable that the intention of a testator, clearly expressed and not intrinsically objectionable, should be respected

The ratio decidendi incapable of general application

¹ See especially: Abbot, 24 *L.Q.R.* 143; Falconbridge, *Conflict of Laws* (2nd ed.), pp. 143-5, 151-2; Morris, 18 *B.Y.B.I.L.* 43-44; Mendelssohn-Bartholdy, *Renvoi in English Law*, pp. 58-64. The decision is described by Falconbridge as the *fons et origo mali* in English Conflict of Laws, 53 *L.Q.R.* 552. Lord Wensleydale in *Bremer v. Freeman* (1857), 10 Moo. P.C. 306, 374, said, 'The case was not regularly contested, which makes it of less authority. It was a mere question on the parole evidence of the Belgian law which was very short and unsatisfactory.'

if reasonably possible. What is impossible is that the rule should be allowed a general operation.¹

Moreover, the decision is flatly contradictory to *Bremer v. Freeman*,² where on similar facts the Privy Council held that the *de cuius* was domiciled in France and that the will was formally invalid. The same result was reached in *Hamilton v. Dallas*,³ a case of intestacy.⁴

Frere v. Frere:
formal
validity of
a will

Frere v. Frere.⁵ In this case:

A British subject domiciled in Malta made a will in England, which was formally valid by English law but void by the law of Malta, since it did not bear the signatures of five witnesses.

According to English private international law, the formal validity of this will was a matter for Maltese law as being the *lex domicilii* of the testator. An expert witness, who admitted that he knew of no express decisions on the question, expressed the opinion that such a will made outside the island by a person either of Maltese or of foreign domicile or nationality would not be adjudged void by the local courts, provided that it satisfied the formalities required by the *lex loci actus*. Sir H. Jenner-Fust⁶ merely repeated the expert opinion and said: 'Then, can I say that this will is invalid according to the law of Malta? Certainly not.' The decision, therefore, is one where the reference made by the English rule for the choice of law to the *lex domicilii* was regarded as a reference to the private international law of the domicile. Though unsound in principle, it again exemplifies an indulgence to testators that is not undeserving of sympathy.

In re Annesley:
intrinsic
validity of
a will

The next case, *In re Annesley*,⁷ was concerned with the intrinsic validity of a will.

An Englishwoman was domiciled at the time of her death in France according to the principles of English law, but was domiciled in England in the eyes of French law, since she had never obtained the authorization of the Government which, before 1927, was necessary for the

¹ *In the goods of Lacroix* (1877), 2 P.D. 94, was another case where the English judge seems to have applied both the private international law and the internal law of the domicile. For a neat statement of the facts and the effect of the decision see J. H. C. Morris, 18 *B.Y.B.I.L.* 42, note 4. It was concerned with formal validity.

² (1857), 10 Moo. P.C. 306; *infra*, pp. 532; 537.

³ (1875), L.R. 1 Ch. D. 257.

⁴ 18 *B.Y.B.I.L.* 45.

⁵ (1847), 5 *Notes of Cases in the Ecclesiastical and Maritime Courts*, 593.

⁶ Sir H. Jenner had assumed the name of Fust in 1842.

⁷ [1926] Ch. 692.

acquisition of domicil.¹ Her testamentary dispositions were valid by English internal law, but invalid by French internal law, since she had failed to leave two-thirds of her property to her children.

Russell J. held that the validity of the dispositions must be determined by French law. His actual decision, therefore, was in accordance with the theory explained above that a reference to the law of a given country is a reference to its internal law,² but he did not reach his conclusion in this simple fashion. He preferred the foreign court theory. Two passages indicate what was in the learned judge's mind.

'I accordingly decide that the domicil of the testatrix at the time of her death was French. French law accordingly applies, but the question remains: What French law? According to French municipal law, the law applicable in the case of a foreigner not legally domiciled in France is the law of that person's nationality, in this case British. But the law of that nationality refers the question back to French law, the law of the domicil; and the question arises, will the French law accept the reference back, or *renvoi*, and apply French municipal law?'³

'I have come to the conclusion that I ought to accept the view that according to French law the French courts, in administering the movable property of a deceased foreigner who, according to the law of his country, is domiciled in France, and whose property must, according to that law, be applied in accordance with the law of the country in which he was domiciled, will apply French municipal law, and that even though the deceased had not complied with Article 13 of the Code.'⁴

This language bristles with difficulties.

In the first place the meaning of the expression 'French municipal law', which appears twice in the opening passage, is far from clear. The inference, however, from later parts of the judgment is that at the beginning of the sentence it refers to French private international law and at the end to French internal law. The purport of the passage, therefore, is that

Criticism
of the deci-
sion. Judg-
ment ambi-
guous

¹ Article 13 of the French civil code provided that a foreigner authorized by the Government to establish his domicil in France should enjoy all civil rights there, but the benefit of this authorization ceased at the end of five years if the foreigner had not applied for naturalization or if his application had been dismissed. Therefore a person might well be domiciled in France according to English conceptions but not domiciled there in the eyes of French law. Article 13, however, was repealed by a law of 10 August 1927. See 46 *L.Q.R.* 472-4; 19 *Journal of Comparative Legislation*, 239-44.

² *Supra*, pp. 63-64.

³ At pp. 706-7.

⁴ At p. 708. For article 13 see *supra* note 1.

French private international law refers the matter to the law of Mrs. Annesley's nationality.

French law misunderstood Secondly, this conclusion—that the reference was to the *lex patriae* of the deceased—was fallacious. The French doctrine was that the validity of the will was determinable by the *lex domicilii*, not by the *lex patriae*, of the deceased, but that in the present case this was represented by English law, since she had not acquired a domicile in France according to French law.¹

Judgment inconsistent Thirdly, one half of the judgment is inconsistent with the other.² The learned judge insisted, in accordance with established authority,³ that the French view with regard to the place of domicile was entirely irrelevant, and that he must regard Mrs. Annesley as having died domiciled in France. When, however, he had made his imaginary journey across the Channel, instead of ascertaining what law a French court would administer in the case of a person domiciled in France, he did just the opposite and regarded himself as sitting in Paris dealing with the affairs of a person not domiciled in France.⁴ He said in effect: 'I am bound to regard the deceased as having died domiciled in France'; but when he assumed the role of a French judge he recanted and said: 'Now I am prepared to regard her as having died domiciled in England.'

Involved reasoning It is reasonably clear, however, that he ultimately reached the haven of French internal law by following the routine of the foreign court doctrine:

English private international law refers the matter to French law as being the *lex domicilii*.

A French judge would be referred by his own rules to English law.

He would, however, find himself referred back by English private international law to French law.

Partial renvoi is recognized in France.

Therefore, a French court would accept the remission, and in the result would apply French internal law.

Correct solution preferred, but not adopted, by the judge It is noteworthy, however, that there was an alternative and simpler ground upon which the learned judge would have preferred to base his decision had he not conceived himself to be bound by previous authorities. This, the direct antithesis of the approach that we have just considered, was that the natural

¹ Pillet, *Traité pratique de Droit International Privé*, ii. 607; Niboyet, *Manuel de Droit International Privé* (1928), S. 733; 36 *Y.L.J.* 731; cited by J. H. C. Morris, 18 *B.Y.B.I.L.* 40, note 5.

² J. H. C. Morris, 18 *B.Y.B.I.L.* 40.

³ *Supra*, pp. 52–53.

⁴ See generally Falconbridge, *op. cit.*, pp. 159 et seqq.

meaning of the expression 'the law of a country' is the internal law of the country in question.

'When we say that French law applies to the administration of the personal estate of an Englishman who dies domiciled in France, we mean that French municipal law which France applies in the case of Frenchmen.'¹

Article 13 of the French Code which was in force at the time of *In re Annesley*, and which required the authorization of the Government for the acquisition of a domicile, has since been repealed.² Therefore, if a similar case were to arise now, the deceased would be domiciled in France according both to English and to French law.³ Further, since the rule of private international law recognized in both countries is that the intrinsic validity of a will is governed by the *lex domicilii* of the testator, the application of French internal law would raise no controversy.

Position if facts of *In re Annesley* were to recur

Another case concerned with the intrinsic validity of a will is *In re Ross*.⁴

In re Ross: intrinsic validity of will

The testatrix, a British subject, who was domiciled in Italy, both in the English and the Italian sense, disposed of her property by a will which excluded her son from the list of beneficiaries. This exclusion was justifiable by English internal law, but contrary to Italian internal law which required that one-half of the property should go to the son as his *legitima portio*. She left land in Italy and movable property both in England and Italy.

Luxmoore J. held with regard to the movables that in accordance with the English rule for the choice of law the claim of the son to his *legitima portio* must be determined by Italian law as being the *lex domicilii* of the testatrix. He then put the question—What is meant by the *lex domicilii*?

'Does the phrase, so far as the English law is concerned, mean only that part of the domiciliary law which is applicable to nationals of the country of domicile (sometimes called the "municipal law" or the "internal law"); or does it mean the whole law of the country of domicile, including the rules of private international law administered by its

¹ At p. 709. This view was rejected by Luxmoore J. in *In re Ross*, [1930] 1 Ch. 377, 402; in a later case, *In re Askew*, [1930] 2 Ch. 259, 278, Maugham J. considered that there was 'much to be said for it'.

² *Supra*, p. 77, note 1.

³ This is not certain, however, for the English and French views as to what constitutes domicile differ slightly, more insistence being placed by English law upon the *animus manendi*; 19 *Journal of Comparative Legislation*, 243.

⁴ [1930] 1 Ch. 377.

tribunals? If the former contention is correct, then the English court, in deciding a case like the present, is not concerned to inquire what the courts of the country of domicile would in fact decide in the particular case, but what the courts of the domicile would decide if the *propositus*, instead of being domiciled in the foreign country, was also a national of that country. Whereas if the latter view is the correct one, the English court is solely concerned to inquire what the courts of the country of domicile would in fact decide in the particular case. In my opinion the latter is the correct view, as laid down by the English decisions. . . .¹

In the result the learned judge applied English internal law and disallowed the claim of the son. An Italian judge would have given the same decision. He would have referred the matter to the *lex patriae* and would have rejected the remission made to him by that law.

As regards the land, the English rule for the choice of law referred the judge to Italian law as being the *lex situs*. The expert evidence showed that an Italian court would again turn to the *lex patriae* and would adopt the rule of English internal law applicable to land situated in England and belonging to an English testator. It was held once more, therefore, that the claim of the son failed.

In this way Mrs. Ross was allowed to evade one of the cardinal rules of the legal system, the protection of which she had enjoyed for the last fifty-one years of her life.

The next case, *In re Askew*,² raised an issue of legitimacy.

*In re
Askew:
legitimacy*

By an English marriage settlement made upon the marriage of *X*, a British subject domiciled in England, with his first wife, *Y*, it was provided that *X*, if he married again, might revoke in part the settled trusts and make a new appointment to the children of 'such subsequent marriage'. Some time before 1911, *X*, who had long been separated from *Y*, obtained a German domicile. In 1911, having obtained a divorce from the competent German Court, he married *Z*, in Berlin. Some time before the divorce a daughter had been born to *X* and *Z* in Switzerland. In 1913 *X* exercised his power of revocation and made an appointment in favour of the daughter.

The question before the English court was the validity of this appointment.

The short and correct answer to this question, and one that would have involved no reference to private international law, is that the daughter of *Z* was in no sense a child of the 'sub-

*Correct
ratio
decidendi
overlooked*

¹ At pp. 388-9.

² [1930] 2 Ch. 259; followed in *Collins v. A.-G.* (1931), 145 L.T. 551.

sequent marriage', for the only marriage subsisting at the time of her birth was that between *X* and *Y*. She might be legitimate, but she could not possibly be the child of a non-existing marriage.¹ This fact, however, was not brought to the notice of the trial judge, Maugham J., who insisted that the validity of the appointment depended upon whether the daughter was legitimate. She could not claim legitimacy under the Legitimacy Act, 1926,² since at the time of her birth her father was married to someone other than her mother.³ By English private international law, however, her legitimacy depended upon whether the German *lex domicilii* that was applicable to her father both at the time of her birth and also at the time of his marriage to *Z* recognized *legitimatio per subsequens matrimonium*. The ratio decidendi of the judge

In such a case, however, German private international law refers the matter to the *lex patriae* of the father. Moreover, the doctrine of *partial renvoi* is generally accepted in Germany. If, therefore, a German court were required to pronounce upon the legitimacy of *Z*'s daughter, it would first refer to English law, and then, upon finding a remission made by English law to the *lex domicilii*, would accept this and apply German internal law. In other words, if the English reference to the *lex domicilii* is a reference to the private international law of the domicile, the daughter would be legitimate. Maugham J. felt that both on principle and on the authorities he was obliged to consider the private international law of Germany. He therefore decided in favour of the legitimacy of the daughter and the validity of the appointment.

Another case touching upon the foreign court theory is *Kotia v. Nahas*,⁴ which was an appeal to the Privy Council from the Supreme Court of Palestine. Kotia v. Nahas: intestate succession

The problem here was to ascertain the legal system that governed the order of intestate succession to Mulk land (i.e. land in absolute ownership) situated in Palestine. The legislation of Palestine provided that, where the deceased owner was neither a Palestinian citizen nor a member of one of the religious communities, his Mulk land should be distributed in accordance with his national law. It also provided, however, that if the national law referred the question to the *lex situs*, then the *lex situs* should be applied by a Palestinian court.

The deceased owner in the present case was neither a citizen of Palestine nor a member of one of the religious communities, but a Lebanese

¹ *In re Wicks' Marriage Settlement*, [1940] Ch. 475.

² *Infra*, p. 406. ³ S. 1 (2). ⁴ [1941] A.C. 403.

national. The rule of Lebanese law is that succession to land situated outside the Lebanon shall be governed by the *lex situs*.

The Supreme Court of Palestine held that the succession was to be governed by Palestinian law. This decision was affirmed by the Privy Council.

Correct ground of the decision It is difficult to imagine how the decision could have been different. The court of first instance was bound by Palestinian law, which categorically ordained that in the circumstances under consideration there must be a reference to the national law, but that a remission, if any, made by that law must be accepted. In other words, there was a statutory obligation to accept the doctrine of *partial renvoi*.

The Privy Council's *obiter dictum* Unfortunately, the Privy Council, not content with this reason, delivered an academic disquisition in favour of the foreign court theory and, after citing the two cases of *In re Ross* and *In re Askew*, seized the opportunity to deliver the following *obiter dictum*:

'In the English courts phrases which refer to the national law of a *propositus* are prima facie to be construed, not as referring to the law which the courts of that country would apply in the case of its own national domiciled in its own country with regard (when the situation of the property is relevant) to property in its own country, but to the law which the courts of that country would apply to the particular case of the *propositus*, having regard to what in their view is his domicile (if they consider that to be relevant) and having regard to the situation of the property in question (if they consider that to be relevant).'¹

Objections to the *obiter dictum* This broadside merits four observations.

First, it was otiose in the instant circumstances, since there was a statutory obligation binding upon the Palestinian court to apply the law which the Lebanese courts 'would apply to the particular case of the *propositus*'.

Secondly, 'English courts', so far as is known, are never referred to the national law of the *propositus*. It may be, of course, that this observation is a quibble, and that even with the substitution of 'the law of the domicile' for 'the national law' the dictum was intended to represent the true position. If this substitution is justifiable, it is submitted once more that the view expressed is fallacious.

Thirdly, the Privy Council was sitting in England to hear an appeal from a Palestinian court and as such was constitutionally obliged to expound the private international law of Palestine.

¹ At p. 413.

Its exposition of that law is, therefore, not authoritative upon the rules of English private international law.

Fourthly, the observation that regard must be had to what in the view of the foreign court was the domicile of the deceased, if it is intended to be of general import, offends the cardinal principle that the English view upon the place of domicile must alone prevail.

The next decision is *Armitage v. A.-G.*,¹ the one relevant case, except *In re Askew*, not concerned with the post-mortuary destination of property. *Armitage v. A.-G.*: foreign divorce

The fundamental rule is that a foreign divorce will not be recognized as valid in England unless it has been granted in the country in which the husband was domiciled at the time of the proceedings. A divorce granted according to the internal law of such country is valid in England, even though granted for a reason not sufficient by English internal law.

In *Armitage v. A.-G.* the husband was domiciled in New York. His wife obtained a divorce in South Dakota upon a ground which was sufficient neither by New York nor by English internal law. The evidence showed, however, that a court in New York, had it been seised of the case, would have recognized the South Dakotan decree as valid.

Sir Gorell Barnes held that the validity of the decree must also be recognized in England.

This decision, that a divorce decree will be upheld in England if its validity is admitted either by the internal law or by the private international law of the domicile, is a clear authority in support of the foreign court doctrine. Moreover, within the strict limits to which it is confined, it will no doubt remain unchallenged, for it is obviously of paramount importance that this particular aspect of marital status should be subject as far as possible to a common determining factor. The more universal the recognition granted to the view of the *lex domicilii*, the less danger there is that a person will rank as married in one country but unmarried in another. The decision supports the foreign court doctrine

The last decision is *In re The Duke of Wellington*,² where the facts were as follows: *In re Wellington*: succession to land

The Duke of Wellington, a British subject domiciled in England, left two wills, one dealing with his Spanish, the other with his English property.

¹ [1906] P. 135. For criticisms of the decision see 24 *Canadian Bar Review*, 73. Falconbridge, op. cit., pp. 220-7. ² [1947] Ch. 506.

By the former he left his land in Spain to the person who would succeed both to his English dukedom and to his Spanish dukedom of Ciudad Rodrigo.¹ He died a bachelor, with the result that by the internal law of England his English dukedom passed to his uncle, while by the internal law of Spain his sister succeeded to the Spanish dukedom. Therefore, the Spanish land remained undisposed of, since there was no one person qualified to take both dukedoms.

The problem, therefore, was to identify the person to whom the Spanish land passed, and this depended upon whether the solution was to be found in the internal law of Spain or of England. By the former, the testator was entitled to devise only half of his land, the other half passing as on intestacy;² by English internal law, the land would pass to the next Duke of Wellington under the residuary gift contained in the English will.

Wynn Parry J. decided in favour of English internal law for the following reasons: The English rule for the choice of law referred him in the first instance to Spanish law, which, having regard to such cases as *In re Ross*,³ meant the private international law of Spain; the Spanish code provides that testate and intestate succession shall be determined by the national law of the deceased, whatever be the country in which the property is situated; therefore, the question was whether a Spanish court, having thus been referred to the national (English) law, would accept the remission made by that law to the *lex situs*. In short, was the doctrine of *partial renvoi* recognized in Spain? After considering the conflicting evidence of the expert witnesses and the conflicting decisions of two Spanish courts of first instance, the learned judge reached the conclusion that a court in Spain would not accept the remission made by the national law. Therefore, the present duke was entitled to the land under the English will.

3. *The present law*

Foreign court doctrine of limited application This review of the principal decisions discloses that the foreign court doctrine is not of general application. With two exceptions,⁴ the issue has been confined to the post-mortuary disposition of property, and there has never been any suggestion that the doctrine is to be extended to the field of com-

¹ This will also disposed of his movables in Spain.

² This difference is not brought out in the report, see 64 *L.Q.R.* 266.

³ *Supra*, p. 79.

⁴ *In re Askew*, *supra*, p. 80 (legitimation); *Armitage v. A.-G.*, *supra*, p. 83 (foreign divorce).

mercial law or, indeed, to every question affecting testacy and intestacy. In the countless cases dealing with such matters as contracts, insurance, sale of movables, gifts *inter vivos* or *mortis causa*, mortgages, negotiable instruments, partnerships, dissolution of foreign companies, and so on, the English courts, when referred to 'the law' of a foreign country, have never had the slightest hesitation in applying the internal law of that country. Nevertheless, the decisions, few though they are, stand. They perhaps show that the judges, in considering whether the reference may not be to the private international law of the chosen country, have taken the view 'that the various categories of cases merit individual consideration in the light of expediency' and that the entire problem is not to be decided on *a priori* reasoning.¹ One writer, who has done much to illuminate the subject, suggests that the *renvoi* doctrine cannot be rejected *in toto*, since it has proved to be a useful and justifiable expedient for the solution of at least certain special questions.² The conclusion, in fact, is that in general a reference made by an English rule for the choice of law to a foreign legal system is to the internal law, not to the private international law, of the chosen system, but that this general principle is subject to the following exceptions.

Cases to which it applies

First, grant of probate will not be denied to a will of movables on the ground of formal invalidity if the instrument is formally valid according to the private international law, though not according to the internal law, of the governing legal system.³ Also, where the essential validity of a will⁴ or the intestate succession to movables⁵ is determinable by the law of a foreign country, the view that would be taken of the matter by the foreign judge, if he were seised of the case, must be adopted.

(i) Formal and essential validity of bequests

Secondly, a divorce recognized as valid by the private international law, though not by the internal law, of the governing system (*lex causae*) will be recognized as valid by an English court.⁶

(ii) Foreign divorces

Thirdly, where the issue is the title to foreign land, the English court will administer the private international law of the country where the land is situated, if it would be administered

(iii) Title to foreign land

¹ Rabel, i. 72.

² Falconbridge, 6 *Vanderbilt Law Review*, 708.

³ *Collier v. Rivaz*, *supra*, p. 74; *Frere v. Frere*, *supra*, p. 76.

⁴ *In re Annesley*, *supra*, p. 76; *in re Ross*, *supra*, p. 79.

⁵ *In re O'Keefe*, *supra*, p. 73.

⁶ *Armitage v. A.-G.*, *supra*, p. 83, and *infra*, p. 375.

by a court of the *situs* seised of the same question.¹ This seems inevitable, for it is futile to make an adjudication unless it is one that will be enforceable by the authorities that alone have control over the subject-matter.

Fourthly, a similar exception probably exists where the issue is the title to movables alleged to have been acquired under a foreign *lex situs*. The reason for the exception is the same as in the last case, namely, that it is futile to apply the purely domestic rules of the *lex situs*, if a court at the *situs* which has control of the subject-matter would apply a different rule.²

The
'incidental
question'

After the governing law has been ascertained by the application of the relevant choice of law rule—after it has been ruled, for instance, that the movables of X situated in England must be distributed according to the intestacy code of Italy—a further question of choice of law may arise. Thus, if Italian law admits only legitimate children and if the legitimacy of a particular child is disputed, this dispute must be referred to a definite legal system. But is the appropriate system to be determined according to the English or to the Italian rules for the choice of law? A question of this nature has been aptly termed by Dr. Wolff the 'incidental question',³ though the less satis-

¹ *In re Ross*, *supra*, p. 79; *In re Duke of Wellington*, *supra*, p. 83; *Re Schneider's Estate*, 96 N.Y.S. (2d) 652 (Surr. Ct. 1950), discussed 4 I.L.Q.R. 268-9; 6 *Vanderbilt Law Review*, 725 et seqq. See the American Restatement, S. 8.

² The explanation of these four exceptional cases according to one learned writer, Professor Edwin W. Briggs, is that they represent the application of what he terms 'legislative jurisdictional' or 'power recognizing' rules for the choice of law. His thesis, elaborated in a series of articles (61 *H.L.R.* 1165 et seqq.; 64 *Y.L.J.* 195 et seqq.; 6 *Vanderbilt Law Review* 667 et seqq.; 15 *Missouri L.J.* 77 et seqq.; 4 *I. & C.L.Q.R.* 328 et seqq.; 39 *Minnesota Law Review*, 517 et seqq.) is that where as a matter of policy it can in fact 'be determined that some one State has an admittedly greater concern in the interest involved than any other State' (4 *I. & C.L.Q.R.* 338, note 41), then that State has exclusive jurisdiction to prescribe what legal system shall constitute the *lex causae*. 'The only conflicts rule actually applied by the forum from its own law is a power-recognizing rule, a rule of controlling jurisdiction' (61 *H.L.R.* 1166). It follows from this, he says, that *renvoi* is a false issue (6 *Vanderbilt Law Review*, 697), since, instead of there being a conflict between the forum and the State with legislative jurisdiction, there is agreement between them that the latter shall have absolute and complete power over the matter, including power to determine the appropriate rule for the choice of law.

The difficulty, however, experienced at any rate by the present writer, is how or on what principle to segregate from the general mass of rules for the choice of law those that are of a 'legislative jurisdictional' nature. *Au fond*, is it not the essence of such a rule that 'some one State has an admittedly greater concern in the interest involved than any other State'?

³ Wolff, p. 206.

factory expression 'preliminary question' is in more general use. Jurists differ on the subject. Some favour the choice of law rules of the *forum*, others argue that the law which governs the principal question, i.e. the right of succession in the above example, must govern throughout.¹ Anglo-American judges have never directly considered these opposing views. What they do in practice, in circumstances which are said by jurists to raise this controversy, is generally to separate the incidental from the principal question, and to apply the appropriate English choice of law rule to each.

It remains to add that a convention, designed to reconcile the clash between the *lex domicilii* and the *lex patriae*—by far the most usual situation to raise a problem of *renvoi*—was concluded at The Hague in 1951. Its most important feature is a remarkable concession in favour of the *lex domicilii* made by those delegates at the conference representing countries that favour the principle of nationality, for the crucial article provides as follows:

The Hague
Convention
of 1951

When the country of a person's domicil adopts the principle of nationality and the country of nationality adopts the principle of domicil, every contracting State shall apply the internal law of the domicil.²

The advantages of this rule, if it were to become English law, would be obvious. There would be less need for litigation, since cases such as *In re O'Keefe*³ and *In re Ross*⁴ would present no difficulty; litigation, where necessary, would be less protracted and therefore less expensive, since the baffling inquiry relating to foreign views on the doctrine of *partial renvoi* would no longer be necessary; and questions concerning wills and intestacies would be resolved according to the internal law of the country in which the deceased had established his permanent home.

There is, however, no occasion to consider the convention in more detail, for, though its ratification by Great Britain has been recommended,⁵ much time must inevitably elapse before it is adopted, if indeed it is ever adopted.

¹ Robertson, *op. cit.*, pp. 135 et seqq.; Breslauer, *Private International Law of Succession*, p. 18; Nussbaum, *Principles of Private International Law*, pp. 104-9; Wolff, pp. 206-12; 54 *L.Q.R.* 611-12; 62 *L.Q.R.* 89, book review by J. H. C. Morris; Falconbridge, 17 *Canadian Bar Review*, 377-8; 53 *L.Q.R.* 564; Dicey, pp. 73-76.

² Article 1.

³ *Supra*, p. 73.

⁴ *Supra*, p. 79.

⁵ *First Report of the Private International Law Committee*, Cmd. 9068. For a fuller account of the convention see 38 *Grotius Society Transactions*, 35-39.

CHAPTER IV

GENERAL PRINCIPLES RELATING TO JURISDICTION

- A. Persons to whom the jurisdiction of English courts is applicable. *Pages 88-104.*
 - (i) Persons who cannot sue. *Pages 88-89.*
 - (ii) Persons who cannot be sued. *Pages 89-104.*
- B. The competence of English courts to entertain actions. *Pages 104-121.*
- C. Jurisdiction to stay actions. *Pages 122-126.*

Scope of inquiry

THE two principal matters that require consideration here are, first, whether the jurisdiction of the English courts may be invoked by or against all persons in the world indifferently, and secondly, whether the competence of the courts to exercise jurisdiction over persons who are amenable thereto is in any manner restricted. We will, therefore, deal separately with:

- A. Persons to whom the jurisdiction of English courts is applicable; and
- B. The competence of English courts to entertain actions.

A. PERSONS TO WHOM THE JURISDICTION OF THE ENGLISH COURTS IS APPLICABLE

General rule

The general rule is that all persons may invoke or may become subject to the jurisdiction of the English courts, even though they are foreign by nationality or by domicil and even though the cause of action has arisen abroad or is otherwise intimately connected with a foreign country. Exceptionally, however, there are certain persons who cannot invoke the jurisdiction and certain persons against whom it cannot be enforced.

(i) *Persons who cannot sue.*

Alien

The one person disabled from suing in an English court is the alien enemy. Before a person can bear this character, there must, of course, be a state of war between Great Britain and an enemy country at the time of the attempted proceedings, and whether the countries are still at war despite the cessation of hostilities is conclusively settled by a certificate from the Secretary of State for Foreign Affairs.¹ Given a state of war,

¹ *R. v. Bottrill*, [1947] K.B. 41 (C.A.).

however, the question whether a person is an alien enemy does not depend upon his nationality but upon where he resides or carries on business. A British subject or a neutral who is voluntarily resident or who is carrying on business in enemy territory or in territory under the effective control of the enemy is treated as an alien enemy and is in the same position as a subject of hostile nationality resident in hostile territory.¹ A person of hostile nationality who is within the King's peace, as, for example, when he is resident in England under a cartel² or by permission of the Crown,³ is temporarily free from his enemy character and may invoke the jurisdiction.⁴

An alien enemy can neither initiate an action nor continue one that was commenced before hostilities.⁵

Alien
enemy
cannot sue

The disability of suing is based upon public policy, but there are no considerations of public policy which make it desirable to suspend actions *against* alien enemies, and it is now well established that they may be sued.⁶ Moreover, when sued they can plead a set-off in diminution of the claim of the plaintiff, they can take all the usual procedural steps, and they are at liberty to challenge an adverse judgment by appealing to a higher tribunal.⁷

Alien
enemy can
be sued

(ii) *Persons who cannot be sued.*

Sovereigns and sovereign states. The persons who are immune from the jurisdiction of the English courts, despite their presence in England, are sovereigns and diplomatic officers.

¹ *Per curiam*, *Porter v. Freudenberg*, [1915] 1 K.B. 857, 869; *Sovracht (v.o.) v. Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)*, [1943] A.C. 203. See 58 L.Q.R. 191. For the purposes of the Trading with the Enemy Act, 1939, which penalizes persons having intercourse with the enemy, *de facto* residence, though not voluntary, is sufficient, *Vamvakas v. Custodian of Enemy Property*, [1952] 2 Q.B. 183.

² *The Hoop* (1799), 1 C. Rob. 195, 201.

³ e.g. when he was registered under the Aliens Restriction Act, 1914; *Princess Thurn and Taxis v. Moffit*, [1915] 1 Ch. 58.

⁴ *Johnstone v. Pedlar*, [1921] 2 A.C. 262.

⁵ *Porter v. Freudenberg*, *supra*. An alien enemy, respondent to a petition for the revocation of a patent, has been allowed, however, to amend his specification by way of disclaimer, since this constitutes a defence to the petition; *In re Stahlwerk Becker Aktiengesellschaft's Patent*, [1917] 2 Ch. 272. His right of action is generally abrogated, but sometimes merely suspended; see *Ertel Bieber & Co. v. Rio Tinto Co.*, [1918] A.C. 260; *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*, [1946] A.C. 219; Cheshire and Fifoot, *The Law of Contract* (4th ed.), pp. 278 et seqq.

⁶ *Robinson & Co. v. Continental Insurance Co. of Mannheim*, [1915] 1 K.B. 155; *Porter v. Freudenberg*, *supra*.

⁷ *Porter v. Freudenberg*, [1915] 1 K.B. 857.

Immunity
of sov-
er-
eign per-
sonally

On the principle that sovereign States are equal and independent the rule has come to be that no sovereign independent State will exercise any jurisdiction over the person or the property of any other sovereign State.¹ The law has been reduced to two propositions by Lord Atkin:

'The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages.

'The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. . . .

'I draw attention to the fact that there are two distinct immunities appertaining to foreign sovereigns: for at times they tend to become confused: and it is not always clear from the decisions whether the judges are dealing with the one or the other or both. It seems to me clear that, in a simple case of a writ *in rem* issued by our Admiralty court in a claim for collision damage against the owners of a public ship of a sovereign State in which the ship is arrested, both principles are broken. The sovereign is impleaded and his property is seized.'²

The writ referred to by Lord Atkin is one 'directed primarily against the ship and accordingly, through the ship, against all persons claiming any right or interest in the ship'.³ It is clear, therefore, that to issue such a writ in respect of sovereign property would be to bring the sovereign into court by means of his property instead of by means of his person, since he would be forced either to appear and to submit to the jurisdiction or to allow judgment to go against his property by default.⁴ An early case on the matter is *The Parlement Belge*:⁵

A cross-channel steamer belonging to the Belgian Government, which carried not only the public mails but also merchandise and

¹ *The Cristina*, [1938] A.C. 485; *The Arantzazu Mendi*, [1939] A.C. 256.

² *The Cristina*, *supra*, at pp. 490-1. Unlike Great Britain, most countries have repudiated the doctrine of absolute immunity and they tend to distinguish between acts *jure imperii* and acts *jure gestionis*. There is immunity as regards the former, but not the latter; *Annuaire de l'Institut de Droit International* (1953), pp. 112-21 (Sir Hersch Lauterpacht). For the French practice see 27 *B.Y.B.I.L.* 293 et seqq. An Inter-Departmental Committee, set up to make recommendations upon the law of immunity, found the subject so difficult that it was unable to make a report; House of Commons Debates, vol. 511, col. 81 (Feb. 13, 1953).

³ *The Jupiter*, [1924] P. 236, *per* Hill J., at p. 238.

⁴ *Ibid.*; *The Broadmayne*, [1916] P. 64, at pp. 73-74, *per* Pickford L.J.

⁵ (1880), L.R. 5 P.D. 197; *The Jupiter*, [1924] P. 236.

passengers for hire, came into collision with an English steam-tug lying at anchor in Dover Harbour. An action brought against the steamer was stayed for want of jurisdiction, the Court of Appeal holding that the immunity enjoyed by the Belgian Government was not lost by reason of the ship having been used for trading purposes.

There is no limit to the immunity in the case of the sovereign personally. If he comes to this country, even under an assumed name, and enters into contracts and other engagements under the guise of an ordinary private person, no action can be entertained against him if he chooses to object to the jurisdiction.¹

Personal
immunity

Whether there is any limit to the immunity where an interest in property to which an action relates is claimed by a sovereign is not so clear, for the difficulty is to define what is meant by an interest sufficient to justify a stay of proceedings. It is obvious that if the bare assertion of a right in the property were to be regarded as sufficient, the doctrine of immunity might be nothing but a cloak for injustice. It can, at any rate, be affirmed that in the following cases the immunity is unlimited.

Proprietary
immunity:
when un-
limited

First, where the sovereign State is the admitted owner of the subject-matter of the suit, as in the case of a warship or of the cross-channel steamer in *The Parlement Belge*.

(i) Sover-
eign ad-
mitted
owner

Secondly, where the sovereign State, though not owner, is in *de facto* possession of the subject-matter through its own appointed agent.² This was the position in *The Cristina*.³

(ii) Sover-
eign in
possession

After a privately owned ship, *The Cristina*, registered at Bilbao, had left Spain and was *en route* to Cardiff, the Spanish Republican Government, at that time recognized by Great Britain as the sovereign government of Spain, issued a decree requisitioning all vessels registered at Bilbao. Later, the Spanish Consul at Cardiff dismissed all officers and members of the crew not in sympathy with the Republican cause and appointed a new master and crew on behalf of his government.

It was held that a writ *in rem* issued by the owners claiming possession of the vessel must be set aside. The English courts are not prepared to displace a *de facto* possession obtained without a breach of the peace by the agent of a foreign sovereign.

Thirdly, the immunity applies without restriction where the sovereign, though neither owner nor in *de facto* possession, is in control of the subject-matter. A familiar illustration of this position is where a privately owned ship is requisitioned by the

(iii) Sover-
eign in
control

¹ *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149.

² *The Gagara*, [1919] P. 95; *The Cristina*, [1938] A.C. 485.

³ [1938] A.C. 485.

sovereign and left in the charge of the master and crew appointed by the owner. In such a case the ship is *publicis usibus destinata* and is exempt from process while employed in the service of the sovereign.¹

(iv) Sovereign entitled to immediate possession Finally, the immunity is unrestricted in respect of property to which a sovereign State has an immediate right of possession, as, for example, where goods are in the *de facto* possession of its bailee; or in respect of a debt, the title to which is vested in its servant.² In *U.S.A. v. Dollfus Mieg et Cie S.A. & Bank of England*,³ for instance, the facts were these:

During the war of 1939 the American Army recovered sixty-four gold bars belonging to a French Company that the Germans had seized at Limoges and carried off to Germany. In accordance with an agreement between the Allies, the gold was deposited with the Bank of England pending its ultimate distribution between the U.S.A., France and the U.K. The Bank sold thirteen of the bars by mistake but were still in possession of fifty-one.

The action of the French Company against the bank, claiming delivery of the fifty-one bars and alternatively damages, was set aside for want of jurisdiction. The meaning of 'possession' in connexion with immunity, it was affirmed, must not be allowed to stand on such nice and subtle distinctions as that between the possession of a servant strictly so called and the possession of a bailee at will. In the words of Lord Radcliffe:

'The property of a sovereign State, which is an abstraction, must be in the physical possession of some actual person and I do not see any distinction of substance in a matter of this kind between the possession of a servant of the State and the possession of its bailee when the bailment is of such a nature as that of the Bank in this case.'⁴

Difficulty when sovereign intervenes in action between third-parties The four categories of cases already considered cover the situation where the ouster of a sovereign State from its existing ownership, possession or control is the object of the legal proceedings. What raises a far more complex problem, however, is an attempt by a sovereign to intervene in an action by two third-parties and to obtain a stay of proceedings on the ground that it possesses, for instance, a contractual interest to the property to which the action relates. In such a case the court is faced with a dilemma. On the one hand the court itself offends the principle of immunity if it requires the sovereign to estab-

¹ *The Broadmayne*, [1916] P. 64; *The Arantzazu Mendi*, [1939] A.C. 256.

² *Hyderabad (Nizam) v. Jung*, [1956] 3 W.L.R. 667; 3 All E.R. 311.

³ [1952] A.C. 582.

⁴ *Ibid.*, at p. 618.

lish a claim; on the other hand, it can scarcely be content with the bare assertion of a claim that may or may not in fact be baseless.¹ Dealing with this latter position, Lord Greene in *Haile Selassie v. Cable and Wireless Ltd.*,² remarked:

'It would be a strange result if a person claiming property in the hands of, or a debt alleged to be due by, a private individual in this country, were to be deprived of the right to have his claim adjudicated upon by the courts merely because a claim to the property or the debt had been put forward on behalf of a foreign sovereign.'

The facts of the case itself were these:

By a contract made in 1935 between the defendants and the Ethiopian Director of Posts acting on behalf of the Emperor Haile Selassie, the defendants agreed to pay to the Emperor a proportion of the charges received by sending cables to and from Addis Ababa. In May, 1936, Italy annexed the Empire of Ethiopia and thereafter the British Government recognized the Italian Government as the *de facto* sovereign of the country, though it still recognized the Emperor as *de jure* sovereign.

Haile Selassie v. Cable & Wireless Ltd.

The Emperor brought the present action in 1937 for the recovery of £10,613. 11. 3d., the amount due to him under the contract of 1935. The Italian Ambassador then notified the defendants that the above sum was claimed by his Government.

In view of this claim Bennett J. ordered that all further proceedings should be stayed. The Court of Appeal, however, discharged this order, holding that a sovereign cannot enforce the stay of an action to which it is not a party merely by putting forward a claim to an interest in the *res litigiosa*.

'But where property which is not proved or admitted to belong to, or to be in the possession of, a foreign sovereign or his agent is in the possession of a third party, and the plaintiff claims it from that third party, and the issue in the action is whether or not the property belongs to the plaintiff or to the foreign sovereign, the very question to be decided is one which requires to be answered in favour of the sovereign's title before it can be asserted that that title is being questioned.'³

The implication of this passage is that, when the sovereign is not a party to the action, his possessory or proprietary interest in the subject-matter must either be admitted or proved before immunity from the jurisdiction will be recognized.

¹ See the remarks of Lord Radcliffe in *U.S.A. v. Dollfus Mieg et Cie S.A. & Bank of England*, [1952] A.C. 582, at p. 616.

² [1938] Ch. 839, at p. 845.

³ *Ibid.* at p. 844.

Juan Ysmael & Co. v. Indonesian Government,¹ where the facts were these:

The owners of a vessel issued a writ *in rem*, addressed to all parties interested, by which they claimed that legal possession of the vessel should be decreed in their favour. The Indonesian Republic, to whom the vessel had been chartered under a charter party now expired, moved to set the writ aside on the ground that their agent had made a contract with the owners' agent for the purchase of the vessel.

The Privy Council rejected this claim to immunity, being satisfied that the contractual title claimed was 'manifestly defective', since the owners' agent, as the agent of the Republic well knew, had no authority to sell the vessel.

As regards the burden of proof imposed upon a sovereign State which claims an interest in the subject-matter of an action between third parties, the Board expressed the following opinion:

'The sovereign State is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign Government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached.'²

It is submitted with respect that this is guidance of doubtful value. A manifestly defective title as in the instant case is one thing, but whether the title is illusory may be more difficult to determine. The title claimed by the Italian Government in *Haile Selassie's case* can scarcely be described as illusory, and yet, rightly it is submitted, the Court of Appeal refused to apply the doctrine of immunity. The line between substantial and unsubstantial claims defies precise definition, and it seems preferable in the interests of common justice to maintain the principle formulated by Lord Atkin³ and others and expressed by Jenkins J. in the following words:

'Where the principle of immunity is invoked in cases in which the foreign sovereign State is not itself sued, but which concern property in which the foreign sovereign State claims some proprietary or possessory interest, then, in the absence of a proved or admitted right of property

¹ [1955] A.C. 72. See discussion in 4 *I. & C.L.Q.R.* 469; 18 *M.L.R.* 184.

² *Ibid.*, at pp. 89-90.

³ *The Cristina*, [1938] A.C. 485, at p. 490.

in the foreign sovereign State, possession or control by it of the thing in suit is a condition essential to the application of the principle.¹

It is difficult to believe that the courts will depart from the principle formulated by the learned judge.

A clear exception to the doctrine of immunity occurs where a foreign sovereign is one of the claimants to a trust fund falling within the jurisdiction of the English court.² In such a case the Court of Chancery treats the administration of the trust as its domestic responsibility and it is prepared to determine the right of the beneficiaries, even though these may possibly or certainly include a foreign sovereign.³

Immunity excluded in administration of a trust

The question which has been much canvassed, but never decided in England, is whether the doctrine of immunity can be successfully invoked where the action concerns immovables situated in England. If, for instance, the Government of the U.S.A. has taken a lease of a house in London for the accommodation of some mission which is not part of its diplomatic *entourage*,⁴ can the lessor sue for the recovery of rent or to recover possession under the proviso for re-entry if the covenant to repair has been broken?⁵ Sir Robert Phillimore said *obiter* that 'the exemption from suit is deemed not to apply to immovable property',⁶ and Westlake, after remarking that 'no court can be expected to renounce the determination of the property in its soil',⁷ described as unimaginable the suggestion that a mortgagee of English land could not have his usual remedies in England because the mortgagor was a foreign sovereign.⁸

Quære whether immunity excluded in action relating to land

There is no English decision which supports or rejects Westlake's opinion and, though the question was argued with great learning by counsel in a modern case before the Privy Council, the Board was not required in the circumstances to

¹ *Dollfus Mieg et Compagnie v. Bank of England*, [1949] Ch. 369, at p. 382.

² *Larivière v. Morgan* (1872), L.R. 7 Ch. 550; on appeal *sub nom. Morgan v. Larivière* (1875), L.R. 7 H.L. 423, the House of Lords admitted the exception, but held that in the circumstances no trust existed.

³ See the remarks of Lord Radcliffe in *U.S.A. v. Dollfus Mieg et Cie S.A. & Bank of England*, [1952] A.C. 582, at pp. 617-18.

⁴ If the house were occupied by a diplomatic envoy, another principle of immunity would apply; *infra*, p. 101.

⁵ Case put by Sir Eric Beckett in the *Annuaire de l'Institut de Droit International* for 1952, p. 72.

⁶ *The Charkieh* (1873) L.R. 4 Ad. & Ecc. 59, at p. 97.

⁷ *Private International Law* (4th ed.), p. 247; (7th ed.), p. 267.

⁸ *Ibid.* (4th ed.), p. 249.

provide an answer and it refrained from expressing an opinion one way or the other.¹ It would seem, however, that Westlake's opinion is correct. Where the immunity clearly applies, as, for example, in the case of an action relating to a ship, a person claiming to be the owner can, at any rate in theory, seek his remedy in the courts of the foreign sovereign and he may well succeed if a right of action is available there similar to that given by the Crown Proceedings Act, 1947.² But no foreign court is competent to adjudicate upon a claim to land in England, and if the English court is to be deprived of jurisdiction there is no tribunal in the world by which justice can be done.

Immunity
of national
ships

The immunity of public property from jurisdiction that was definitely established in *The Parlement Belge* led to considerable injustice when what Scrutton L.J. has described as the 'fashion of nationalization' was started in the European war of 1914. The practice was for Governments to requisition private ships but to continue them in their former service as ordinary trading vessels, with the result that a number of national ships were sailing the seas immune from all liabilities. Thus in *The Porto Alexandre*,³ a former German ship that had been requisitioned by the Portuguese Government got aground in 1919 at the entrance to the Mersey while she was carrying a cargo of cork shavings for a private trading company. Proceedings brought by the salvors for the services that they had rendered were set aside on the ground that the vessel was public national property. It has further been held that this immunity exists even after the ship has reverted to private ownership, though only, of course, with respect to acts that occurred during State ownership.⁴ This practice of using ships owned by the State for ordinary trading purposes has greatly increased in recent years.⁵

If a sovereign so far condescends to lay aside his dignity as to enter the competitive markets of commerce,⁶ it is inconsistent that he should stand upon his dignity in times of trouble. He should not be allowed, as Sir Robert Phillimore once remarked, 'to throw off his disguise and appear as a sovereign

¹ *Johore, Sultan of v. Abubakar Tunku Aris Bendahar*, [1952] A.C. 318. All the foreign authorities on either side were collected by counsel and the arguments provide a storehouse of learning for the curious.

² 10 & 11 Geo. VI, c. 44.

³ [1920] P. 30.

⁴ *The Tervaele*, [1922] P. 259.

⁵ As to the legal aspects of State trading, see 25 *B.T.B.I.L.* 34 et seqq. (J. E. S. Fawcett).

⁶ *The Cristina*, [1938] A.C. 485, 498, per Lord Macmillan.

claiming for his own benefit and to the injury of a private person for the first time all the attributes of his character'.¹ In *The Cristina*² it was held by the House of Lords that a trading vessel requisitioned by the Spanish Government during the civil war and presumably required for the purposes of defence or attack was entitled to immunity. She was *publicis usibus destinata* in the true sense. Yet three of the law lords questioned the correctness of the decision in *The Porto Alexandre*, and Lord Maugham expressed the opinion in vigorous and convincing terms that if Governments choose to trade as ship-owners in times of peace they ought to submit to the same legal actions and remedies as any other ship-owner.³

Conferences upon the matter were held at London, Gothenburg, Genoa and Brussels between 1922 and 1926, with the result that the Immunity of States' Ships Convention was concluded at Brussels in 1926. This, as amended by a protocol on May 24th, 1934, provided that commercial vessels and cargoes belonging to States should be justiciable to the same extent as if privately owned, and that even non-commercial ships owned by Governments should be subject to the jurisdiction of the national, though not of foreign, courts.⁴ The convention, however, has not been ratified by Great Britain.

The status of a foreign sovereign is a matter of which the court takes judicial notice, that is to say it is a matter which the court is either assumed to know or to have the means of discovering without embarking upon a contentious inquiry.⁵ Where it is doubtful whether a person enjoys sufficient independence to entitle him to immunity, as, for instance, in the case of a ruler in Malaya⁶ or in a case after the India Independence Act, 1947, of a former ruler of an independent state in India,⁷ the court must apply in the normal case to the Secretary of State for Foreign Affairs or if the alleged sovereign resides in the British Commonwealth, then to the Commonwealth Relations

Proof of
sovereignty

¹ *The Charkieh* (1873), L.R. 4 Ad. & Eccles. 59, 99.

² [1938] A.C. 485.

³ At pp. 521-3. See 42 L.Q.R. 25, 308; 6 *Journal of Comparative Legislation and International Law*, 272.

⁴ The convention was ratified by Germany, Italy, Holland, Belgium, Estonia, Poland, Brazil, Chile and Hungary.

⁵ *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149, per Kay L.J., at p. 161.

⁶ *Ibid.*

⁷ *Sayce v. Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State*, [1952] 2 Q.B. 390.

Office. The answer is final and conclusive and cannot be questioned either by the parties or by the court.¹

'The reason is, I think, obvious. Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognize as a fellow sovereign in the family of States; and the relations of the foreign State with ours in the matter of State immunities must flow from that decision alone.'²

Distinction
between *de*
facto and
de jure
sovereign

The same rules apply to the delicate situation that arises when two contending bodies each claim to be the sovereign Government of a foreign country, as was the case, for instance, during the revolution that broke out in Spain in 1936. At one stage, for instance, in the Spanish civil war, the British Government recognized the Spanish Republican Government as the *de jure* Government of the whole of Spain, but at the same time it also recognized the insurgent Government of General Franco as the Government *de facto* of certain areas of the country in which the nationalist intervention had succeeded. The duty of the court in such circumstances is to treat the acts of the *de facto* Government within the area in question as unquestionable, and conversely to treat the acts of the *de jure* Government within the same area as mere nullities.³

Status of
Govern-
ment De-
partments

Whether a particular department of a foreign sovereign State or a body closely related to that State, such as the United States Shipping Board, itself enjoys sovereign immunity is not a matter of which judicial notice is possible or one upon which a Secretary of State can give a conclusive certificate. In such a case the foreign Government must prove the status of the department or other entity by adducing appropriate evidence. It would appear that after the status of the entity in the eyes of the foreign law has been shown it falls to the judge to decide whether its connexion with the foreign State is sufficiently close to entitle it to immunity. The certificate of the foreign

¹ *Foster v. Globe Venture Syndicate Ltd.*, [1900] 1 Ch. 811; *Duff Development Co. v. Kelantan Government*, [1924] A.C. 797.

² *The Arantzazu Mendi*, [1939] A.C. 256, at p. 264, *per* Lord Atkin.

³ *Banco de Bilbao v. Sancha*, [1938] 2 K.B. 176 and authorities there cited. For the different types of recognition see 19 *B.T.B.I.L.* 238. 'A *de jure* Government is one which in the opinion of the person using the phrase ought to possess the powers of sovereignty, though at the time it may be deprived of them. A *de facto* Government is one which is really in possession of them, although the possession may be wrongful or precarious'; Wheaton, *International Law* (5th English ed.), p. 36, adopted by Scrutton, L.J., *Luther v. Sagor* [1921] 3 K.B. 532, 543.

ambassador or other official should not be conclusive.¹ The question arose in *Krajina v. Tass Agency*.²

An action for damages was brought against the Tass Agency, which was registered in England as a Telegraphic News Agency, for an alleged libel published in a weekly paper called *The Soviet Monitor*. The Agency was described in the Russian statute by which it had been established as 'the telegraphic agency of the U.S.S.R.', and as such entitled to 'all the rights of a juridical person'. The Soviet Ambassador in Great Britain certified that it was a department of the Soviet State 'exercising the rights of legal entity'.

Counsel for plaintiff argued that according to the Soviet constitution Tass was a legal entity having a juridical existence apart from that of the Soviet sovereign, and that therefore, being a separate entity, it could not possess sovereign immunity.

The Court of Appeal, however, held in the first place that the evidence given did not establish the separate existence of Tass. The argument therefore failed *in limine* and the immunity of the defendants was recognized. The members of the court, however, adumbrated what their opinion would have been had the independent existence of Tass been proved. Cohen L.J. and Tucker L.J. did not think that the immunity would necessarily be excluded, since according to English practice a Government department may well have a separate legal existence without it ceasing to be part and parcel of the sovereign State.³ Singleton L.J. admitted, however, that if Tass were a separate legal entity 'the position might be different'.

'So far as I can see,' he said, 'there is no precedent for extending immunity to a corporate body carrying on business in this country, and I should wish for further argument before deciding that it would be so extended.'⁴

Proceedings brought against a foreign sovereign must be stayed if he remains passive or if he moves to set the writ aside, but it is always open to him to waive his immunity and to submit to the jurisdiction. The general principle is that such submission is ineffective unless it is made at the time when the jurisdiction of the court is invoked. It cannot, for instance, be

Sovereign
may submit
to juris-
diction

¹ But see Singleton L.J. in *Krajina v. Tass Agency*, [1949] 2 All E.R. 274, at p. 285. The matter is fully discussed in *Annuaire l'Institut de Droit International* (1952), pp. 88-89 (vol. i).

² [1949] 2 All E.R. 274.

³ Ibid., at pp. 280, 284.

⁴ Ibid., at p. 285.

inferred from the previous conduct of the sovereign.¹ Nor does it suffice that he is a party to a contract which provides that all disputes shall be referred to arbitration,² or to the English courts.³ Waiver, in fact, is effective only where the sovereign himself invokes the jurisdiction as a plaintiff or where he appears as a defendant without objection and fights the case on its merits, or where he is bound by treaty to submit to the particular proceedings that have been brought against him.⁴

Effect of
submission

According to English law, a submission made in one of these three ways is severely limited in extent. It is not a submission to the jurisdiction generally. Its only effect is to enable the court to do justice in the matter actually referred to it for decision.⁵

‘If the waiver is by appearing as defendant and arguing on the merits it will extend only to the case disclosed in the writ or pleadings and the plaintiff will not subsequently be able to widen the scope of his action by amendment of the pleadings or otherwise, unless there is a new waiver to cover the amendment. If it is a waiver by appearing as plaintiff, the court will have jurisdiction to decide on matters put before it by the defendant only to the extent that justice requires that the court should consider them in order that it can pronounce on the plaintiff’s claim.’⁶

Thus where the South African Government applied to the court for the appointment of a new trustee of a fund into which the defendants, concessionaires of a railway in the Transvaal, had paid a large sum of money, it was held that a counter-claim for damages in respect of an alleged breach of the concession by the Government must be struck out. Its object was not to mitigate the particular relief sought by the sovereign plaintiff,

¹ *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149.

² *Duff Development Co. v. Kelantan Government*, [1924] A.C. 797.

³ *Kahan v. Pakistan Federation*, [1951] 2 K.B. 1003.

⁴ This last possibility, designed to meet the exigencies of Civil Air Transport now frequently carried on by Government bodies, is envisaged by the Administration of Justice Act, 1938, s. 13, which provides that if States enter into a convention by which they agree to render themselves or their property liable to proceedings in the courts of other States and if H.M. certifies by Order-in-Council that the convention has come into force as respects England, every foreign State adhering to the convention shall be deemed to have submitted to any proceedings to which it is made a party in the Supreme Court.

⁵ *Duff Development Co. v. Kelantan Government*, [1923] 1 Ch. 385, at p. 417, *per* Lord Sterndale; at p. 421, *per* Lord Warrington.

⁶ Sir Eric Beckett, *Annuaire l’Institut de Droit International* (1952), i. 79.

but to obtain a decision upon a dispute not raised by the statement of claim.¹

Within these limits, however, i.e. for the purpose of the very proceedings to which submission has been made, the sovereign is bound by the English rules relating to counter-claims and defences, and also by procedural requirements, such as the obligation to make discovery of facts or documents or to give security for costs.²

Ambassadors and other diplomatic officers.

It has long been recognized that the representatives in this country of a sovereign State are sent on the faith that they shall have the same immunity from adverse jurisdiction as the sovereign power whom they represent.³ The Diplomatic Privileges Act, 1708,⁴ which is declaratory though not exhaustive of the common law,⁵ provides in accordance with this principle that an ambassador accredited to this country cannot be sued against his will. He is exempt from civil and criminal liability. This immunity is shared by his personal family, i.e. by his wife and children if living with him, and by his diplomatic family, as it is sometimes called, namely, his counsellors, secretaries, clerks and domestic servants.⁶ A consul is not a diplomatic envoy and is immune from jurisdiction only to a limited extent. His archives and the official papers kept at the consulate are inviolable and he is not liable either to civil or criminal proceedings for acts performed in his official capacity and falling within the functions of a consular officer. In contrast to a diplomatic officer, however, he is liable in respect of his private transactions.⁷ This disparity, now that certain countries such as the United States of America have amalgamated their diplomatic and consular services, is calculated to cause embarrassment.⁸

Immunity
of diplo-
matic
officers

¹ *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1898] 1 Ch. 190.

² *Republic of Costa Rica v. Erlanger* (1876) 3 Ch.D. 62 (costs); *Prioleau v. United States & Andrew Johnson* (1866), L.R. 2 Eq. Cas. 659 (discovery).

³ *The Parlement Belge* (1880), 5 P.D. 197, 207 *per curiam*; *Dickinson v. Del Solar*, [1930] 1 K.B. 376. For a detailed account of the rules governing diplomatic immunity see 30 *B.Y.B.I.L.* 116-51; 31 *B.Y.B.I.L.* 299-340 (A. B. Lyons). See further, 40 *Transactions of the Grotius Society*, 65 et seqq.

⁴ 7 Anne, c. 12. For an account of the circumstances leading up to this statute see Blackstone's *Commentaries*, i. 255.

⁵ *The Amazone*, [1940] P. 40.

⁶ *Engelke v. Musmann*, [1928] A.C. 433, 450, *per* Lord Phillimore.

⁷ 21 *B.Y.B.I.L.*, pp. 34 et seqq. (article by Sir Eric Beckett).

⁸ The United Kingdom made a Consular Convention with the U.S.A. in 1949; 25 *B.Y.B.I.L.* 280.

The immunity is absolute in the case of an ambassador or public minister and his family and remains effective even though he engages in private trading, but it does not extend to the servants of the Embassy so far as they engage in trading transactions.¹

Diplomatic officers may submit to jurisdiction A diplomatic officer may waive his privilege, but he can do this effectively only if he has full knowledge of his rights, and provided that he first obtains the consent of his sovereign or of his official superior.² His immunity is the immunity of the ambassador and ultimately that of the Government which he represents, so that if it is waived by the ambassador or by the Government it ceases.³

Proof of diplomatic rank It is usual for an ambassador to furnish the Foreign Office with a list of persons engaged in the Embassy, and it has now been established that if the Foreign Office accepts this list and informs the court that it includes the name of some person against whom it is sought to take judicial proceedings, the information is final and conclusive upon his status.⁴ In *Engelke v. Musmann*:⁵

The defendant to an action for the recovery of arrears of house rent applied to set aside the writ on the ground that he was a member of the German Embassy. The plaintiff, who contended that the defendant was a consul and therefore not entitled to immunity from the jurisdiction, applied for leave to cross-examine him upon this matter. Leave was given, but upon an appeal from the order the Attorney-General appeared at the request of the Foreign Office and informed the court that the defendant had been accepted by the British Government as a member of the staff of the German Ambassador under the style of Consular Secretary. It was held by the House of Lords that this statement was binding on the court.

Lord Phillimore, after showing that the British Government may refuse to accept any person tendered by an ambassador as a member of his staff, said:⁶

‘When therefore the certificate from the Foreign Office was delivered by the Attorney-General, it was not, as suggested on behalf of the plaintiff, a piece of hearsay evidence, a mere narrative of what the Ambassador had told the Foreign Office. It was a statement of what the

¹ Proviso to 7 Anne, c. 12; *Taylor v. Best* (1854), 14 C.B. 487, at 519, *per* Jervis C.J.; *The Porto Alexandre*, [1920] P. 30, at 37; *Heathfield v. Chilton* (1767), 4 Burr. 2016; *Viveash v. Becker* (1814), 3 M. & S. 284; *Musmann v. Engelke*, [1928] 1 K.B. 90, 103. ² *Dickinson v. Del Solar*, [1930] 1 K.B. 376.

³ *Rex v. A.B.*, [1941] 1 K.B. 454.

⁴ *Taylor v. Best* (1854), 14 C.B. 487; *In re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139; *In re Suarez*, [1918] 1 Ch. 176.

⁵ *Engelke v. Musmann*, [1928] A.C. 433.

⁶ *Ibid.*, p. 451.

Secretary of State, on behalf of His Majesty, had done, not what he was doing *ad hoc* or what he was believing and repeating, but what the Foreign Office had done. The certificate is no attempt on the part of the executive to interfere with the judiciary of the country. The status which gives the privilege has already been created by the Crown in virtue of its prerogative, in order to administer its relations with a foreign country in accordance with international law.¹

Normally the Foreign Office supplies the information upon the request of the court or of one of the litigants, though in cases of importance the Law officers may intervene and themselves inform the court.¹ In *Price v. Griffin*,² however, where the United States Vice-Consul was sued for breach of promise of marriage, the Foreign Office wrote a letter to the court claiming diplomatic immunity for the defendant on the ground that he was a member of the embassy staff and this was accepted as conclusive by Birkett J. This was peculiar in at least two respects: it is not usual for the Foreign Office to act *proprio motu*, and the normal practice is to certify merely the status of the official, leaving it to the court to decide whether this entitles him to diplomatic immunity.

The immunity of an ambassador is not confined merely to the period during which he is accredited to the English sovereign, but continues for such period after presentation of his letters of recall as is reasonably necessary for the winding up of his official business and his private affairs. The fact that his successor enters upon his official duties before the termination of this reasonable period does not affect the immunity.³ But if he is dismissed and his immunity waived by his sovereign, no extension of the immunity is allowed.⁴

The International Organizations (Immunities and Privileges) Act, 1950, which consolidates the Diplomatic Privileges (Extension) Acts, 1944, 1946, and 1950, provides that all or some of the privileges and immunities specified in the schedule to the Act may be conferred by Order in Council upon the following organizations and their members:⁵

(i) International organizations,⁶ such as the United Nations, the

¹ 26 *B.Y.B.I.L.* 434.

² *The Times* newspaper, 20 February 1948; 2 *I.L.Q.R.* 266; but more adequately stated and discussed 26 *B.Y.B.I.L.* 433-7 (A. B. Lyons).

³ *Magdalena Steam Navigation Company v. Martin* (1859), 2 E. & E. 94; *Musurus Bey v. Gaddan*, [1894] 2 Q.B. 352.

⁴ *Rex v. A.B.*, [1941] 1 K.B. 454.

⁵ See 4 *I.L.Q.R.* 245-7.

⁶ International Organizations (Immunities and Privileges) Act, 1950, paras. 1 (1), (2) (a); Schedule Part I.

International Court of Justice, and the International Labour Office.

- (ii) Representatives and high officers of such organizations, persons employed by them on missions, members of their official staff and members of committees.¹
- (iii) Other officers of the organization² and members of the families of high officers.³

The maximum immunities that may be granted to an organization or to a member thereof vary with each case. Thus, high officers and members of committees and missions may be put on the same footing as a foreign ambassador with regard to immunity from suit and legal process, inviolability of residence, and exemption from taxes,⁴ but the maximum privileges of other officers and servants are limited to immunity from suit and legal process in respect of things done in the course of their employment and to exemption from income-tax upon their official salaries.⁵

The Diplomatic Immunities Restriction Act, 1955, provides that if the personal immunities enjoyed by the envoys of a foreign sovereign Power exceed in any respect those granted in the territories of such Power to an envoy of Her Majesty, they may be withdrawn by Order in Council to such extent and in respect of such classes of persons as appears proper.⁶ It is also provided that no citizen of the United Kingdom and Colonies shall be entitled to personal immunities,⁷ though this prohibition does not extend to any immunity enjoyed by virtue of an office held before the passing of the Act.⁸ The expression 'personal immunities' means

'immunity from suit or legal process (except in respect of things done or omitted to be done in the course of performance of official duties) and inviolability of residence'.⁹

B. THE COMPETENCE OF ENGLISH COURTS TO ENTERTAIN ACTIONS

Scope of inquiry The object of the present section is to state in general terms the circumstances in which English courts are competent to entertain cases that involve some foreign element. It is obvious

¹ International Organizations (Immunities and Privileges) Act, 1950, para. 1 (2) (b); Schedule, Part II. ² Ibid., para. 1 (2) (c).
³ Ibid., Schedule, Part IV, para. 13. ⁴ Ibid., Schedule, Part II.
⁵ Ibid., Schedule, Part III. ⁶ 4 Eliz. 2, c. 21, S. 1 (1).
⁷ Ibid., S. 2 (1). ⁸ Ibid., S. 2 (2). ⁹ Ibid., S. 3 (1).



that the power to adjudicate upon matters which have occurred abroad must be subject to some restriction, for otherwise, to mention only one consideration, a judgment would often be nothing but a *brutum fulmen*. We therefore require to know what limits exist to the exercise of jurisdiction and what are the principles that lie at the base of those limitations.

The general doctrine of English Law is that the exercise of civil jurisdiction, in the absence of an Act of Parliament, must in all cases be founded upon one or other of two principles, namely, the principle of effectiveness or the principle of sub-
Jurisdiction based on one of two principles

The principle of effectiveness means that a judge is not competent to pronounce a judgment if he cannot enforce it within his own territory.² The elementary truth several times stated by Holmes J., that 'the foundation of jurisdiction is physical power',³ is the controlling factor at common law, although, as we shall see, there are certain exceptional cases in which statutory jurisdiction may be assumed over persons who are abroad and thus not within the power of the court.⁴ Power in this connexion signifies the physical power that exists when the property which is the subject-matter of the suit is in England or when the defendant is present in England at the time of service of the writ, and, broadly speaking, it is true to say that an English court does not consider itself competent to adjudicate upon a claim if neither of these elements is present.⁵ In such a case the maxim is *actor sequitur forum rei* and the plaintiff has no alternative but to sue the defendant in the country where he happens to be. The position was clearly stated by the Privy Council in the leading case of *Sirdar Gurdial Singh v. Rajah of Faridkote*.⁶
Principle of effectiveness

'All jurisdiction is properly territorial, and *extra territorium ius dicentis, impune non paretur*. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily

¹ Cp. Duncan and Dykes, *Principles of Civil Jurisdiction as applied in the Law of Scotland*, p. 8.

² Dicey, pp. 22-23; Story, s. 539; *Tallack v. Tallack*, [1927] P. 211, at p. 221.

³ *McDonald v. Mabee* (1917), 37 Sup. Ct. 343, Cheatham, p. 96; *Michigan Trust Co. v. Ferry* (1913), 33 Sup. Ct. 550, Lorenzen, p. 59; *In re The Indiana Transportation Co.* (1917), 244 U.S. 256; Beale, i. 281.

⁴ R.S.C. Order xi, R. 1, *infra*, pp. 113 et seqq.

⁵ It will be seen later that the existence of property in England founds jurisdiction *in rem*, but not jurisdiction *in personam*, against its owner; *infra*, p. 108.

⁶ [1894] A.C. 670; and see the statement of Lord Selborne in *Berkley v. Thompson* (1884), 10 App. Cas. 45, 49.

resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over movables within the territory; and, in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled, within the territory.'

Principle
of sub-
mission

The principle of submission means that in a limited number of cases a person may voluntarily submit himself to the judgment of a court to whose jurisdiction he would not otherwise be subject.¹ If he does so he cannot afterwards say that the judgment of that court is not binding upon him.² Such a submission may even be inferred from conduct.³

Principle of
effective-
ness over-
rides prin-
ciple of
submission

It is doubtful, however, whether much reliance can be placed upon submission as a basis for the exercise of jurisdiction. For one thing it has no application in cases where English private international law directs that some foreign court shall have exclusive jurisdiction. Thus, for instance, a husband or wife domiciled abroad is not permitted at common law to institute a suit in England for the dissolution of marriage, since divorce jurisdiction resides exclusively in the court of the domicile.⁴ Again, it is not always possible in given circumstances to ascertain with certitude from the reported decisions what acts constitute a submission to the authority of the court.⁵ Moreover, it would appear from the case of *Tallack v. Tallack*⁶ that when the principles of effectiveness and of submission conflict, that is to say, when the judgment of the court cannot be effective against the party who has submitted, the principle of effectiveness prevails and jurisdiction will not be exercised.

In this case *Tallack*, a domiciled Englishman, obtained a divorce in England from his wife, who was originally of Dutch nationality. The wife later married the co-respondent, a domiciled Dutchman, and so herself became domiciled in Holland. Nine months after the divorce Mr. Tallack applied to the Probate Division of the High Court peti-

¹ Bar 922; Dicey, p. 24; *The Gemma*, [1895] P. 285; *The Duplex*, [1912] P. 8.

² *Feyerick v. Hubbard* (1902), 71 L.J., K.B. 509; *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, at p. 161.

³ *Copin v. Adamson* (1875), 1 Ex. D. 17; *infra*, p. 612.

⁴ *Infra*, p. 366.

⁵ See *infra*, pp. 612 et seqq., for the analogous question whether a party has submitted himself to the jurisdiction of a *foreign* court.

⁶ [1927] P. 211; *Goff v. Goff*, [1934] P. 107; *In re Duller's settlement* (No. 2), [1951] Ch. 842.

tioning that his former wife should be compelled to settle £4,000 upon the children of her first marriage. The wife's property was all in Holland, and it was proved that by Dutch law execution could not be had in Holland of any settlement ordered by the English court. The wife protested the jurisdiction to order a settlement.

Lord Merivale held that even if the protest by the wife amounted to submission, which he denied, he had no jurisdiction to adjudicate upon the claim, for, having regard to the law of Holland, a decree directing a settlement of the wife's property would be 'an idle and wholly ineffectual process'.

'I am not persuaded', he said, 'that an appearance to such a petition as the present, qualified at all stages of the case by a distinct and reasoned denial of the existence of jurisdiction, could with any propriety be regarded as a submission to the exercise of the jurisdiction so denied.'

If, now, we examine the main rules concerning jurisdiction, leaving the question of submission out of account, we shall find that at common law a court will not arrogate jurisdiction over a case unless, consistently with the principle of effectiveness, there is a reasonable certainty that it will be able to enforce its judgment. This becomes apparent if we examine the different causes of action that may raise a question of private international law.¹

Rules of jurisdiction tested by principle of effectiveness

We will first deal with a personal action, i.e. one whose object is to settle the rights of the parties as between themselves, but only between themselves, whether it relates to an obligation or, as in the case of detinue, to property.² The principle of effectiveness is here triumphant. Jurisdiction depends upon physical power, and since the right to exercise power, or, what is the same thing in the present connexion, the power of issuing process, is exercisable only against persons who are within the territory of the Sovereign whom the court represents, the rule at common law has always been that jurisdiction is confined to persons who are within reach of the process of the court at the time of service of the writ. A court cannot extend its process and so exert sovereign power beyond its own terri-

Actions in personam

Their dependence upon physical power

¹ See particularly Dicey, pp. 28-35; Duncan and Dykes, *Principles of Civil Jurisdiction as applied in the Law of Scotland*, *passim*.

² A preferable title is action *inter partes*, Wolff, *Private International Law*, p. 64. It has been described by Holmes J. as one brought 'to establish a claim against some particular person . . . or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defence'; *Tyler v. Judges of the Court of Registration* (1900), 175 Mass. 71.

torial limits. Even if the words of an English statute, literally interpreted, give the courts jurisdiction over foreigners, the jurisdiction will not be exercised unless the foreigner 'is here'.¹ The same principle governs proceedings against a foreign company, in which case the transaction of business by the company in England is the equivalent of its presence in England.²

'The root principle', said Lord Haldane, 'of the English law about jurisdiction is that the judges stand in the place of the Sovereign in whose name they administer justice, and that therefore whoever is served with the King's writ, and can be compelled consequently to submit to the decree made, is a person over whom the courts have jurisdiction.'³

Thus in *Forsyth v. Forsyth*⁴ in 1948 the Court of Appeal held that English justices have no jurisdiction to entertain a claim for maintenance under the Summary Jurisdiction Acts brought by a wife resident in England against her husband who was domiciled and resident in Scotland. In this particular instance, however, the law has been altered by the Maintenance Orders Act, 1950,⁵ which provides for the enforcement throughout the United Kingdom of certain maintenance and other similar orders made in England, Scotland or Northern Ireland.

The fact that England is the *forum domicilii* or the *forum reigestae* or the place where a business has been carried on by an individual person is insufficient at common law to found jurisdiction against an absent defendant. What is more important is that the court has no jurisdiction to entertain an action *in personam* against an absent person merely because property, whether movable or immovable, belonging to him is situated in England. It is his presence, not the presence of his property that is essential before an action *in personam*, as distinct from an action *in rem*, can be brought against him.⁶

The essential would appear to be that jurisdiction should exist at the inception of the suit. Thus a court which has once asserted its power by service of process upon the defendant

Continu-
ance of
physical
power not
essential

¹ *Ex parte Blain* (1879) 12 Ch.D. 522.

² *The Lalandia*, [1933] P. 56; *The Holstein*, [1936] 2 All E.R. 1660. As to what transaction of business suffices for this purpose see *infra*, p. 195.

³ *John Russell & Co. Ltd. v. Cayzer Irvine & Co. Ltd.*, [1916] 2 A.C. 298, 302.

⁴ [1948] P. 125; *Macrae v. Macrae*, [1949] P. 397.

⁵ 14 Geo. 6, c. 37; see 4 *I.L.Q.R.* 365.

⁶ *Infra*, p. 110.

personally is not rendered incompetent by his subsequent departure from England.¹

It may be doubted whether the interests of justice and convenience are served by this insistence that the mere transient presence of the defendant in England suffices to render him amenable to English jurisdiction. The principle is certainly unobjectionable in the case of itinerants with no fixed residence,² but there is little to commend a rule which permits the institution of proceedings against a defendant domiciled and resident abroad merely because he was served with a writ during a visit of a few hours to Folkestone. It is noteworthy, also, that the Foreign Judgments (Reciprocal Enforcement) Act, 1933,³ whose object it is to facilitate the enforcement in England of judgments obtained abroad, specifies the residence, not the mere presence, of the defendant in the foreign country as one of the circumstances sufficient to found the jurisdiction of the foreign court in personal actions. Moreover, the English view is not always harmonious with the principle of effectiveness, for a judgment against a foreigner resident abroad is a *brutum fulmen* unless followed by proceedings in his own country, and foreign courts can scarcely be expected to recognize a jurisdiction based upon mere transient presence. However, until the matter is altered by statute, there is no escape from the proposition that the mere transient presence of the defendant in England, however short his stay may be, renders him amenable to the jurisdiction of the English courts.⁴

The principle of effectiveness clearly prevails in the case of an action *in rem*. This form of action is one whose object it is to establish as against the whole world some proprietary or possessory interest in movables or immovables or to adjudicate upon the status of a person. It differs from an action *in personam* in that the decree of the court is not confined in its effect to the actual parties to the suit but embraces the disposition of the thing itself and purports to bind everybody in the world who might deny the validity of the interest sought to be established.⁵ Instances of such a proceeding occur where it is sought

¹ Cp. the American case of *Michigan Trust Co. v. Ferry* (1913), 33 Sup. Ct. 550; Lorenzen, p. 59.

² Cp. the Scottish case of *Linn v. Casadinos* (1881), 8 R. 849, Duncan and Dykes, *Principles of Civil Jurisdiction*, pp. 56-57.

³ *Infra*, pp. 605 et seqq.

⁴ Cp. *Carrick v. Hancock* (1895), 12 T.L.R. 59; *infra*, p. 610.

⁵ *Castrigue v. Imrie* (1870), L.R. 4 H.L. 414, 427-8; *Dollfus Mieg et Compagnie S.A. v. Bank of England*, [1949] Ch. 369, at p. 383, *per* Jenkins J.;

Should presence in England found jurisdiction?

Actions in rem

to recover land, to foreclose a mortgage, to attach the property of a debtor or to establish a lien over movable goods.

Depend upon existence of property in England The local situation of property determines the sovereign to whose physical power it is subject, and the rule is that an English court has jurisdiction to entertain an action *in rem* only if the subject-matter of the suit is situated in England at the time of the proceedings.¹ But the mere presence of property in England does not render an absent owner *personally* amenable to the jurisdiction.² The court is competent to adjudicate upon all questions directly relating to the property but not to pronounce judgment upon matters unconnected therewith. To command international validity the judgment must do no more than determine the owner's rights with regard to the property.³

If, for instance, the ship of a Frenchman resident in Paris is arrested at Southampton, the court is entitled to declare a lien in favour of a salvor, but having once acquired jurisdiction to this extent over the defendant it cannot proceed to try an action that is totally unconnected with the arrested ship.⁴

If, however, the owner of an arrested ship against which proceedings *in rem* have been instituted appears and deposits security as bail, thus obtaining the release of the vessel, he submits himself to the jurisdiction of the court, and thereby renders himself personally liable to process of execution in respect of the amount by which the ultimate judgment against him may exceed the amount of the bail.⁵

Jurisdiction, however, is not so restricted in all legal systems. Thus, by Scottish law the possession of immovable property in Scotland, or even the possession of movables if they are arrested in the hands of a third party, is sufficient to found jurisdiction against an absent possessor and entitles the courts to entertain personal actions against him, other than actions relating to status.⁶ Similar rules obtain in many Continental systems of law. A judgment given after this mode of process

Tyler v. Judges of the Court of Registration (1900), 175 Mass. 71, *per* Holmes J.; *infra*, pp. 621 et seqq.

¹ *Castrique v. Imrie*, *supra*; Story, ss. 550, 591-2.

² *The Beldis*, [1936] P. 51, 83-84.

³ *Emanuel v. Symon*, [1908] 1 K.B. 302; Story, s. 549; Dicey, p. 34; Wharton, s. 667.

⁴ *The Beldis*, [1936] P. 51.

⁵ *The Gemma*, [1899] P. 285; *The Joannis Vatis* (No. 2), [1922] P. 213; 18 B.T.B.I.L. (1937), pp. 232-3.

⁶ Duncan and Dykes, *Principles of Civil Jurisdiction*, pp. 71 et seqq.

would not be valid in England¹ unless the defendant had personally submitted to the Scottish jurisdiction,² and not even then if his submission was made with the sole object of saving property that had already been seized.³

The next inquiry relates to jurisdiction over questions of personal status. If jurisdiction should not be arrogated unless it can be exercised effectively, what court is competent to entertain, for instance, a suit for divorce, for nullity of marriage or for a declaration of legitimacy? English law has answered this question on the principle that status is a *res* and that an action affecting status is an action *in rem*. Thus Lord Dunedin has referred to the status of marriage as follows:

Jurisdiction in questions of status

'Neither marriage nor the status of marriage is, in the strict sense of the word, a *res*, as that word is used when we speak of a judgment *in rem*. A *res* is a tangible thing within the jurisdiction of the court, such as a ship or other chattel. A metaphysical idea, which is what the status of marriage is, is not strictly a *res*, but it, to borrow a phrase, savours of a *res*, and has all along been treated as such.'⁴

To discover, therefore, what court has jurisdiction the only essential is to ascertain where this fictitious *res* is situated. Having no physical situation it is in general deemed to be situated in the country where the person or persons affected are domiciled. Domicil is to personal status what local space is to a tangible thing. This, of course, is not entirely consistent with the principle of effectiveness, since physical presence and domicil in a country are not invariably co-existent.

Depends upon domicil

The propriety of basing jurisdiction in matters of status upon domicil has been defended by Brett L.J. in the following well-known passage, in which he was concerned more particularly with jurisdiction to decree the dissolution of marriage:

Dependence of status jurisdiction upon domicil justified

'The status of marriage is the legal position of the married person as such in the community or in relation to the community. Which community is it which is interested in such relation? None other than the community of which he is a member; that is the community with which he is living as a part of it. But that in fact is the community in which he is living so as to be one of the families of it. That is the community in which he is living at home with intent that among or in it should be the home of his married life. But that is the place of his

¹ *Schibsy v. Westenholz* (1870), L.R. 6 Q.B. 155, 163; *Emanuel v. Symon*, [1908] 1 K.B. 302.

² *Poinet v. Barrett* (1885), 55 L.J., Q.B. 39.

³ *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; *infra*, pp. 613-14.

⁴ *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641.

domicil. It follows that upon principle the only law which should assume to alter his status as a married man is the law of the country of his domicil; the only court which should assume to decree such alteration is a court administering the law of that country.¹

Not wholly true that status jurisdiction depends upon domicil Despite all this, however, English law has far from unre-servedly followed the doctrine that jurisdiction over matters of status is conditioned solely by domicil. The courts, though they have affected to equate status with a *res*, have in some cases persuaded themselves that this *res* possesses a surprising number of local situations. They have certainly remained true to principle in the matter of divorce, for one of the most rigid rules, varied only slightly by statute, is that jurisdiction to dissolve a marriage resides exclusively in the court of the domicil. But it is far otherwise, for instance, with jurisdiction to annul a marriage. We shall see later that for this purpose the metaphysical *res*—the marriage—may be situated in the country where the marriage was celebrated, or where the parties are domiciled, or where they have a residence short of domicil, or even where one of them had a pre-marriage domicil which has since been lost. Perhaps the most that can be said is that *prima facie* jurisdiction in matters of status is deemed to belong exclusively to the court of the domicil.

Succession and trusts The jurisdiction of the English courts in cases of trusts and of succession on death depends upon the property or the persons (i.e. the trustees or personal representatives) being present in England, and it is therefore consistent with the principle of effectiveness.² The property is deemed to be in England for this purpose if English law is the *lex causae* of the trust, as, for example, where the instrument of creation, though executed abroad, shows a clear intention that its provisions are to be governed by the law of this country.³

Insufficiency of principles of effectiveness and submission Such in outline are the general rules that govern the exercise of jurisdiction, but if the principles of effectiveness and of submission are to be exclusive guides in this matter of com-

¹ *Niboyet v. Niboyet* (1878), 4 P.D. 1, at p. 13.

² *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34; *In re The Colonial Bishoprics' Fund 1841*, [1935] 1 Ch. 148-77. This sometimes causes an unfortunate conflict of jurisdiction between the courts of England and Scotland, for in the latter country the same principle obtains. The historic example is the Orr-Ewing trust which gave rise to separate actions in England and in Scotland, both of which went to the House of Lords. The reference to the Scottish appeal is *Orr-Ewing's Trustees v. Orr-Ewing* (1885), 13 R. (H.L.) 1. For an account of the cases see Duncan and Dykes, *Principles of Civil Jurisdiction*, pp. 214-15.

³ Cp. *In re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573, *infra*, p. 515.

petence, it is clear that circumstances must frequently occur in which an English court will be excluded from a jurisdiction that on grounds of convenience and natural justice it ought to possess. Those principles leave no room for a jurisdiction based upon the *forum rei gestae* being English. The fact that a tort has been committed or that a contract has been made or broken in England is not alone sufficient to render the court competent. If, before the issue of a writ, an English debtor escapes abroad or if a foreigner returns home after contracting an obligation here, the judicial machinery of England cannot be put in motion unless an action *in rem* is brought in respect of property in this country. The only remedy of the aggrieved party in such a case is to follow the wrongdoer to his place of residence according to the maxim *actor sequitur forum rei*.

Owing to considerations of this nature an entirely new kind of jurisdiction, generally called 'assumed' jurisdiction, was introduced by the Common Law Procedure Act, 1852, which gave the courts a discretionary power to summon absent defendants, whether English or foreign. The exercise of this jurisdiction is now governed by Order xi of the Rules of the Supreme Court which empowers the court, upon an application to it being made, to permit the service of a writ of summons upon an absent defendant in the circumstances which will be enumerated below. Rule 6 of the Order specifies the method by which service is to be effected. If the defendant is a British subject, no matter in what part of the world he may be, or if he is a foreigner present in 'British Dominions' the writ itself must be served upon him. In all other cases service of notice of the writ is essential. Thus the writ itself must be served upon a defendant in Eire.¹

Consequent introduction of 'assumed' jurisdiction

It is essential to appreciate that the right of jurisdiction conferred by this Order differs from that which is recognized at common law, for whether it shall be exercised or not in any given case lies within the discretion of the court. It is a jurisdiction that *may*, not which *must*, be exercised. The Order is not imperative. It merely confers upon the court 'a new power which it is enabled to exercise in particular cases which seem to it to fall within the spirit as well as the letter of the various classes of case provided for'.² Thus leave to serve a writ will be refused if England is not the *forum conveniens*, as, for

Discretionary nature of assumed jurisdiction

¹ *Hume Pipe and Concrete Construction Co. Ltd. v. Moracrete Ltd.*, [1942] 1 K.B. 189.

² *Johnson v. Taylor Bros.*, [1920] A.C. 144, 153, *per* Lord Haldane.

example, where the defendant is a foreigner resident abroad and where the circumstances do not justify the expense and inconvenience which he will suffer from a trial in England.¹ It has been recognized by the Court of Appeal that if in the circumstances the construction of the Order is at all doubtful it should be resolved in favour of the foreigner; and also that, since the application for leave is made *ex parte*, full and fair disclosure of all the facts is necessary.² On the other hand, if it appears probable that the plaintiff owing to political or other reasons will not receive a fair trial abroad, the court may well exercise its discretion in favour of the application for service out of the jurisdiction, even though both parties to the suit are foreigners and even though their rights fall to be governed by foreign law.³

Criticism
of O. xi A general criticism which may fairly be directed against the policy of Order xi is that several of the reasons for which it allows service abroad are not sufficient according to English law to confer jurisdiction upon foreign courts. There is a lack of reciprocity. English courts no doubt expect that judgments delivered by them in virtue of assumed jurisdiction will be universally recognized, yet they are not always prepared to recognize foreign judgments given in similar circumstances. It is obviously undesirable to claim a wider jurisdiction than is conceded to the courts of other countries.⁴

The cases
that fall
under
O. xi, R. 1 The following are the cases in which, under O. xi, R. 1, an application may be made to the court for leave to serve notice of a writ on an absent defendant in the case of an action *in personam*:

- (a) Where the whole subject-matter is land situated within the jurisdiction.⁵
- (b) When any act, deed, will, contract, obligation or liability affecting land within the jurisdiction is sought to be construed, rectified, set aside or enforced in the action.⁶

These two sub-sections deal with a case where the land is in England and where, therefore, jurisdiction *in rem* exists at

¹ *Rosler v. Hilbery*, [1925] 1 Ch. 250, 259; *In re Schintz*, [1926] Ch. 710, 716; *Société Générale de Paris v. Dreyfus Brothers* (1885), 29 Ch. D. 239, 242; *George Monro Ltd. v. American Cyanamid and Chemical Corp.*, [1944] 1 K.B. 432; *The Metamorphosis*, [1953] 1 W.L.R. 543.

² *The Hagen*, [1908] P. 189, 201; *Bloomfield v. Serenyi*, [1945] 2 All E.R. 646.

³ *Oppenheimer v. Louis Rosenthal & Co., A.G.*, [1937] 1 All E.R. 23.

⁴ 16 B.T.B.I.L., p. 96. But see *infra*, pp. 619-20.

⁵ O. xi, R. 1 (a).

⁶ O. xi, R. 1 (b).

common law, but their novelty lies in also allowing jurisdiction *in personam* to be assumed against a defendant who is not in England. The scope of (b), however, is not altogether clear.¹ According to Lord Coleridge C.J. it must be limited to any proceedings 'affecting land', a phrase which he held did not include an action for the recovery of rent.² On the other hand it has been held that it includes an action against the assignee of a lease for breach of a covenant to repair³ and an action by the tenant of a farm to recover compensation for improvements.⁴

- (c) Where any relief is sought against any person or corporation domiciled or ordinarily resident within the jurisdiction.⁵

This, which is an extensive departure from common law principles, empowers a judge to entertain practically any kind of action⁶ against an absentee, provided that he is domiciled or ordinarily resident in England. The expression 'ordinarily resident' is vague, but it includes a case where a man keeps a permanent house in England though he is living abroad at the time of service.⁷

- (d) When the action is for the administration of the personal estate of any deceased person domiciled within the jurisdiction at the time of his death, or for the execution, as to property within the jurisdiction, of the trusts of any written instrument of which the person to be served is trustee, and which ought to be executed according to the law of England.⁸

The important fact to observe here is that service out of the jurisdiction under the second part of the Rule will not be permitted, unless some property subject to the trust is actually situate in England at the time when leave to effect service is sought. Thus leave was refused where the defendant trustee had sold the entire trust funds and had departed abroad with the proceeds.⁹

¹ Dicey, pp. 184-5.

² *Agnew v. Usher* (1884), 14 Q.B.D. 78.

³ *Tassell v. Hallen*, [1892] 1 Q.B. 321.

⁴ *Kaye v. Sutherland* (1887), 20 Q.B.D. 147.

⁵ O. XI, R. 1 (c); O. LXXI, R. 1.

⁶ *In re Liddell's Settlement Trusts*, [1936] Ch. 365; Dicey, p. 186.

⁷ *Hadad v. Bruce* (1892), 8 T.L.R. 409. The same expression is used in the Matrimonial Causes Act, 1950, s. 18 (1) (b); see *infra*, p. 347.

⁸ O. XI, R. 1 (d).

⁹ *Winter v. Winter*, [1894] 1 Ch. 421.

- (e) Where the action is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or other relief for or in respect of a breach of contract in the following cases:
- (i) Where the contract is made in England,¹ and the defendant is neither domiciled nor ordinarily resident in Scotland.
 - (ii) Where the contract is made by or through an agent trading or residing in England on behalf of a principal trading or residing out of England, provided that the defendant is neither domiciled nor ordinarily resident in Scotland.²

This part of the Rule is applicable even though the agent has no authority to effect a completed contract. Thus in *National Mortgage and Agency Co. of New Zealand v. Gosselin*³ the London agent of a Belgian firm, who was employed merely for the purpose of obtaining orders, sent the firm's price list to the plaintiff. The plaintiff gave an order which was forwarded by the agent and accepted through the post by the Belgian firm. It was held that the contract had been made 'through' the agent, for, though the final acceptance did not lie with him, he had negotiated its terms.

- (iii) Where the contract is by its terms or by implication to be governed by English law, provided that the defendant is neither domiciled nor ordinarily resident in Scotland.

This means that what is called the *proper law* of the contract⁴ must be English law.⁵

- (iv) Where the action is in respect of a breach *in England* of a contract *wherever made*, even though the English breach has been preceded by a breach abroad which rendered impossible of performance that part of the contract which ought to have been performed in England.⁶

The latter part of the Rule meets such a case as *Johnson v. Taylor*,⁷ where Swedish sellers failed to ship goods which they had sold to English buyers under a contract c.i.f. Leeds. Under

¹ *Bremer Oeltransport G.m.b.H. v. Drewry*, [1933] 1 K.B. 753; *Entores Ltd. v. Miles Far East Corporation*, [1955] 2 Q.B. 327. A contract is deemed to have been made where the letter of acceptance is posted; *infra*, p. 225.

² *The Metamorphosis*, [1953] 1 W.L.R. 543.

³ (1922), 38 T.L.R. 832.

⁴ *Infra*, pp. 205 et seqq.

⁵ *N. V. Kwik Hoo Tong Handel Maatschappij v. Finlay & Co.*, [1927] A.C. 604. *Ocean Steamship Co. v. Queensland State Wheat Board*, [1941] 1 K.B. 402.

⁶ *Oppenheimer v. Louis Rosenthal & Co., A.-G.*, [1937] 1 All E.R. 23.

⁷ [1920] A.C. 144.

the Rule as it then stood,¹ leave for service out of the jurisdiction was refused, for, though the failure to deliver the shipping documents represented a breach in England, the substantial breach was the non-shipment of the goods at Stockholm. Under the present Rule, however, leave would be grantable in such a case.

It will be noticed that leave cannot be granted under (e) (iv) unless three conditions are fulfilled: the alleged contract must in fact have been made; it must have been broken; and the breach must have occurred in England. This does not mean, however, that the plaintiff is obliged to satisfy the judge beyond all reasonable doubt that the conditions have been fulfilled, for this would involve an *ex parte* trial of the case on its merits. The governing requirement is that the case should be a proper one for service out of the jurisdiction, and if there is a strong argument for the contention that the three conditions have been fulfilled, there is a proper case for service out of the jurisdiction.²

It has been held that the court in its discretion may grant leave under this sub-section (e) where the plaintiff claims an account against a person abroad, despite the fact that usually the foreign forum is the most convenient place for the production of the relevant books and documents.³

Leave, however, cannot be granted under the Rule if the defendant is domiciled or ordinarily resident in Scotland or Northern Ireland.

(ee) Where the action is founded on a tort committed within the jurisdiction.⁴

It was held in *Kroch v. Rossell et Cie*⁵ that leave to serve notice of a writ under this heading will not be granted if the tort has no substantial connexion with England. In that case:

The plaintiff, who was a foreigner with no English associations or interests, alleged that defamatory statements had been published of him in two foreign daily papers, one Belgian, the other French.

¹ 'The action is founded on any breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction.' The rule as given in the text was substituted in 1911.

² *Vitkovice Horni a Hutni Tezirstvo v. Korner*, [1951] A.C. 869.

³ *International Corporation Ltd. v. Besser Manufacturing Co.*, [1950] 1 K.B. 488.

⁴ O. XI, R. 1 (ee); added in 1920. *Hobbs v. Australian Press Association*, [1933] 1 K.B. 1; *Bata v. Bata* (1948), 92 Sol. Jo. 574.

⁵ [1937] 1 All E.R. 725.

Assuming that the statements were defamatory, it was clear that a tort had been committed within the jurisdiction, for a few copies of the paper had been sold in London, but nevertheless the Court of Appeal refused to allow service out of the jurisdiction on the ground that no question of substance arose in England and that the claim of the plaintiff was essentially one which should be investigated in the foreign countries concerned.

In another case, which is criticized fully in a later chapter, the Court of Appeal refused to allow service on a defendant corporation in New York, on the ground that the 'wrongful act' had been committed in New York, although the resultant damage had occurred in England.¹

- (f) When any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought.²

The courts refuse to grant permission under this Rule unless the substantial and genuine dispute between the parties is whether an injunction against some act in England ought to be granted. The plaintiff cannot found the jurisdiction of the English court by claiming an injunction that is only incidental to the relief that he in fact desires.

Thus, in *Rosler v. Hilbery*,³ *X*, a Belgian, had been appointed by a court at Antwerp to act as sequestrator of a Belgian Company which was in liquidation. An English Company which was being wound up owed the Belgian Company £22,500. The English court, upon the application of *X*, ordered the sum to be paid to *Y*, who was *X*'s London solicitor, and instructed him not to part with it until a further order had been made. The plaintiffs, who were Belgians and who claimed to be entitled to the money, brought an action against *X* and *Y* in England, claiming *inter alia* an injunction against *Y* from parting with the money.

The Court of Appeal refused permission to serve *X* in Antwerp, for the real action was against him, and it was only with the view of having this tried in England, instead of in Belgium, that the plaintiffs had claimed an injunction against *Y*.

¹ *George Monro & Co., Ltd. v. American Cyanamid Corp.*, [1944] 1 K.B. 432; *infra*, p. 280.

² *Rosler v. Hilbery*, [1925] Ch. 250; *De Bernaldes v. New York Herald*, [1893] 2 Q.B. 97 N; *Watson v. Daily Record*, [1907] 1 K.B. 853; *Morocco Bound Syndicate v. Harris*, [1895] 1 Ch. 534.

³ [1925] Ch. 250.

- (g) When any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.¹

Leave to serve a person abroad may be obtained under this Rule in circumstances that are not covered by any of the previous Rules, as, for instance, when a tort has been committed in a foreign country by two persons jointly, only one of whom is domiciled or ordinarily resident in England.² But leave will not be granted if there are substantial defendants in England and if there will be no real advantage to the plaintiff in joining the persons who are abroad.³ It is also essential that there should be a bona fide action between the plaintiff and the person who is within the jurisdiction, for if that person is joined with the sole object of making a foreigner amenable to the English court, leave will be withheld.⁴ The words 'properly brought' have been inserted for the protection of persons abroad,⁵ for it is a serious matter to expose a foreigner, who owes no allegiance here, to the inconvenience and annoyance of having his rights contested in this country.⁶ The defendant in England must not be a mere dummy, a subordinate and secondary defendant to the person abroad. Thus in *Witted v. Galbraith*:⁷

A ship belonging to *X*, a domiciled Scotsman, arrived in the Thames and steps were taken by *Y*, a London shipbroker, to have her unloaded. The plaintiff's husband, while engaged in unloading, was killed by falling down a hatchway. The plaintiff commenced proceedings against *Y* for negligence and applied for leave to serve process upon *X* in Glasgow.

In refusing leave Lindley L.J. said:

'Supposing that both defendant firms were resident within the jurisdiction, would they both have been joined in the action? I cannot think so; there is no plausible cause of action against the brokers. I come to the conclusion that the brokers have been brought into the action

¹ O. xi, R. 1 (g).

² *Croft v. King*, [1893] 1 Q.B. 419.

³ *Chaney v. Murphy*, [1948] W.N. 130; 64 T.L.R. 489.

⁴ *Witted v. Galbraith*, [1893] 1 Q.B. 577; *Rosler v. Hilbery*, [1925] Ch. 250; *In re Schintz*, [1926] Ch. 710; *Ellinger v. Guinness, Mahon & Co.*, [1939] 4 All E.R. 16; *Bloomfield v. Serenyi*, [1945] 2 All E.R. 646; *The Brabo* (1947), 63 T.L.R. 130.

⁵ *John Russell & Co. Ltd. v. Cayzer Irvine & Co. Ltd.*, [1916] 2 A.C. 298.

⁶ *Société Générale de Paris v. Dreyfus Bros.* (1885), 29 Ch. D. 239, 242; (1887), 37 Ch. D. 215.

⁷ [1893] 1 Q.B. 577.

simply to enable the plaintiff to bring the other defendants within the jurisdiction. It is not a bona fide cause of action properly brought against a person who has been served within the jurisdiction.'

A difficult question which was considered by the House of Lords in *The Brabo*¹ is whether leave should be given if the liability of the persons within the jurisdiction is disputed and a substantial doubt exists with regard to the matter. It would seem that the discretion of the court should be exercised in favour of the plaintiff without investigating disputed facts if he has a probable course of action against the persons in England and also perhaps if the issue raises 'an exceptionally difficult and doubtful point of law'.² But if all the facts are set out and are uncontradicted, the court should decide the question of law whether the action would succeed against the parties present in England.

- (h) Where the action is by a mortgagee or mortgagor in relation to a mortgage of *personal property* within the jurisdiction and seeks relief of the following kind, namely, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee; but does not seek (except so far as permissible under (e) above) any personal judgment or order for payment of any moneys due under the mortgage.³

This Rule was framed in order to avoid the decision in *Deutsche National Bank v. Paul*,⁴ where it was held that an action for foreclosure was not covered by clause (e) above, even though the mortgagor had failed to pay the principal and interest due under his personal covenant.

- (i) Where the action is one under the Carriage by Air Act, 1932.⁵

If service abroad has been allowed under one of the heads of Order XI, Rule 1, the plaintiff is not allowed later to add to his statement of claim a claim for another cause of action for which leave to serve a writ out of the jurisdiction would not have been given.⁶

Actions on
the Revenue
side

Order LXVIII, Rule 3, provides that Order XI shall extend, so far as it is applicable, to proceedings on the Crown side and on the Revenue side of the King's Bench Division. This, how-

¹ *Tyne Improvement Commissioners v. Armement Anversoils S/A (The Brabo)*, [1949] A.C. 326.

² *Ibid.*, at p. 341, *per* Lord Porter.

³ O. XI, R. 1 (h) (1916).

⁴ [1898] 1 Ch. 283.

⁵ O. XI, R. 1 (i), 1933, *supra*, p. 11.

⁶ *Waterhouse v. Reid*, [1938] 1 K.B. 743.

ever, does not abolish the right given to the Crown by the Crown Suits Act, 1857, to effect service out of the jurisdiction. Section 37 of the Act provides that in a suit at law on the revenue side against a British subject resident out of the jurisdiction in any place except Scotland and Ireland, the informant may sue out against him a writ for service out of the jurisdiction. The court, if satisfied that the writ has been served personally on the defendant, may then permit the informant to proceed with the suit. It has been held that a British subject, upon whom service has been effected under this Act, cannot have the service set aside on the ground that the prior leave of the court should have been obtained under Order XI.¹

Another case where an action may be brought against persons who are not present in England occurs under Order XLVIII (a) of the Rules of the Supreme Court,² which applies to partnerships. The Order, after providing that co-partners carrying on business in England may be sued in the name of the firm,³ permits the writ to be served without leave either upon one or more of the partners, or upon the person having control of the business at the principal place of business in England.⁴ Therefore, service which is effected upon the person in control of the English business operates as a valid service upon all the partners, even in the case of a colonial or foreign firm all the members of which are resident abroad.⁵ Again, service upon one partner resident in England is effective against the co-partners out of the jurisdiction,⁶ and service effected with the leave of the court under Order XI upon one partner out of the jurisdiction is a good service upon all the other partners out of the jurisdiction.⁷

Service of writ on a partnership under O. XLVIII (a)

Actions that contain a foreign element must frequently require the assistance of judicial and administrative officers in other countries, and Great Britain has therefore made conventions with a number of States in order to facilitate the conduct of legal proceedings in civil and commercial matters. These regulate such matters as the service of judicial and extra-judicial documents, the taking of evidence, security for costs, the right of access to courts, and the right of free legal assistance.⁸

Conventions regarding legal proceedings

¹ *A.-G. v. Prosser*, [1938] 2 K.B. 531.

² See Dicey, pp. 201-4; Westlake, p. 250. ³ R. 1. ⁴ R. 3.

⁵ *Worcester City & County Banking Co.*, [1894] 1 Q.B. 784.

⁶ *Lysaght Ltd. v. Clark & Co.*, [1891] 1 Q.B. 552.

⁷ *Hobbs v. Australian Press Association*, [1933] 1 K.B. 1.

⁸ Annual Practice; O. 11, R. 11; O. 37, R. 54.

C. JURISDICTION TO STAY ACTIONS

Difficulty of plurality of actions The wide jurisdiction that all sovereign powers arrogate to themselves makes it possible for litigation concerning the same matter to occur contemporaneously in two or more different countries. A person, for instance, who commits a tort in Paris may be sued, not only in France, but also in England if a writ is served upon him during his presence in this country. Again, if a libel is published in a Paris newspaper, a few copies of which have been sold in England, permission to serve notice of a writ upon the defendants may be given under O. xi, R. 1 (*ee*),¹ notwithstanding that proceedings have already been instituted in France. In such cases, however, the English proceedings may be met by the plea of *lis alibi pendens*.

Nature of the plea *lis alibi pendens* The question that this plea raises is whether the English court will stay an action, either domestic or foreign, on the ground that the applicant is doubly and unnecessarily vexed by reason of another action for the same cause of action which has been instituted between the same parties in a foreign country. If a litigant brings two actions about the same matter in two different courts *in England*, his conduct is in all cases deemed to be vexatious, and the defendant may demand that he shall elect between the two proceedings.² Where, however, one of the actions has been instituted abroad, a party is not necessarily and inevitably put to his election. The English court undoubtedly possesses jurisdiction to stay one of the actions, but it is a discretionary power that is not lightly exercised in favour of a stay.³ The question may arise in two different cases which it will be simpler to keep separate.

(i) *The plaintiff in England is plaintiff also in a foreign country.*

Courts may stay one of two actions brought by plaintiff It is now established, after a certain amount of doubt, that an English court possesses jurisdiction to stay proceedings at the instance of a defendant who is sued by the plaintiff for the same cause of action in two different countries.⁴ The jurisdiction is *in personam* and can therefore be exercised in respect of proceedings abroad⁵ without raising any conflict between the English and the foreign tribunal.⁶

¹ *Supra*, p. 117.² *McHenry v. Lewis* (1882), 22 Ch.D. 397, 400.³ The Arbitration Act, 1950, s. 4 (2) provides, however, that in certain circumstances the court must stay proceedings taken in respect of a matter upon which a foreign arbitral award has been made, *infra*, p. 606.⁴ *McHenry v. Lewis*, *supra*. ⁵ *Bushby v. Munday* (1821), 5 Madd. 297.⁶ *Cohen v. Roshfield*, [1919] 1 K.B. 410, 417, *per* Eve J.

But whether the jurisdiction will be exercised is another matter. The court exercises its discretion with the greatest caution, for it is imperative that the right of access to the tribunals of a country should not be lightly interfered with. It is not sufficient for the defendant merely to show that two actions have been started,¹ for in the view of the English courts it is not *prima facie* vexatious to commence two actions about the same subject-matter, one here and one abroad.² The reason of this reluctance to exercise the jurisdiction is that, owing to a possible difference between the laws of the two countries, the stay of one of the actions may deprive the plaintiff of some advantage which he is justified in pursuing. Thus, he may have a personal remedy in one country and a remedy only against the goods in another, or a remedy against land in one State but no such remedy in another.³ Again, where there are several defendants, it may be that a judgment delivered in one country cannot be enforced against them in the other. Further, owing to uncertainty as to the state of the cause lists in the two countries, the plaintiff may have deliberately started the double proceedings with the view of pressing those which are more likely to afford him a speedy decision.⁴

Juris-
diction to
stay action
not freely
exercised

The rule, therefore, is that a plea of *lis alibi pendens* will not succeed and the court will not order a stay of proceedings, unless the defendant proves vexation in point of fact. He must show that the continued prosecution of both actions is oppressive or embarrassing, an onus which he will find it difficult to discharge if the plaintiff can indicate some material advantage that is likely to result from each separate action. The courts have consistently refused to attempt any general definition of the term 'vexation' in this connexion. Thus, in a leading case Bowen L.J. said:

Defendant
must prove
vexation in
point of
fact

'I agree that it would be most unwise . . . to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end.'⁵

¹ *Peruvian Guano Co. v. Bockwoldt* (1883), 23 Ch.D. 225, 232, *per* Lindley L.J.

² *Cohen v. Rothfield*, [1919] 1 K.B. at p. 414, *per* Scrutton L.J.

³ *McHenry v. Lewis* (1882), 22 Ch.D. at p. 401, *per* Jessel M.R.

⁴ *Ibid.*, at p. 403, *per* Jessel M.R.

⁵ *Ibid.*, at pp. 407-8.

Each case, then, depends upon its circumstances, and it is only by way of illustration that the authorities are helpful. It is a simple matter to suggest examples of vexatious proceedings, for example, where the plaintiff to a dispute of a complicated character, involving many witnesses and documents, which is in course of litigation abroad, serves a writ on the defendant while the latter is on a short visit to England,¹ but in most of the decisions in which the issue has been raised the courts have refrained from exercising their jurisdiction to order a stay of proceedings.²

(ii) *The plaintiff in England is defendant abroad, or the defendant in England is plaintiff abroad.*

Actions rarely stayed if not brought by same person The fact which distinguishes either of these cases from the one considered above is that the person whom it is sought to stay has not initiated two actions. It follows from this that the courts are even more reluctant to interfere than where the same person is plaintiff in both countries, for the result of a stay of proceedings will be to confine the party stayed to an action over which he has not an equal control.³ It would appear, in fact, that *Bushby v. Munday*⁴ is the only case in which a defendant to an action in England has been restrained from continuing an action which he has instituted abroad, and there the justification was that, owing to the superior powers of discovery possessed by English courts, there was more likelihood of the facts being correctly ascertained here than in the defendant's action in Scotland.⁵ *Sealey (orse Callan) v. Callan*⁶ exemplifies the extreme reluctance of the courts to exercise their jurisdiction.

A wife, resident in England but domiciled in Natal filed a petition for divorce in the High Court under s. 18 (1) (b) of the Matri-

¹ *Logan v. Bank of Scotland*, [1906] 1 K.B. 141, 152, per Gorell Barnes L.J.

² Actions were stayed in the following cases: *Logan v. Bank of Scotland* (No. 2), [1906] 1 K.B. 141; *In re Norton's Settlement*, [1908] 1 Ch. 471; *Egbert v. Short*, [1907] 2 Ch. 205; *The Christiansborg* (1885), 10 P.D. 141; *The Marinero*, [1955] P. 68.

Actions were *not* stayed in: *Ostell v. Lepage* (1851), 5 De G. & Sm. 95; *McHenry v. Lewis*, *supra*; *Peruvian Guano Co. v. Bockwoldt* (1883), 23 Ch.D. 225; *Hyman v. Helm* (1883), 24 Ch. D. 531.

³ *Cohen v. Rothfield*, [1919] 1 K.B. 410, 414, per Scrutton L.J.; *The Janera*, [1928] P. 55; *The London*, [1931] P. 14; *St. Pierre v. South American Stores Ltd.*, [1936] 1 K.B. 382; *The Madrid*, [1937] P. 40; *The Ithaka*, [1939] 3 All E.R. 630, *Orr Lewis v. Orr Lewis*, [1949] P. 347.

⁴ (1821), 5 Madd. 297.

⁵ *Cohen v. Rothfield*, [1919] 1 K.B. 410.

⁶ [1953] P. 135. See also *Thornton v. Thornton*; *Christian v. Christian* (1897), 67 L.J. (P.) 18; (1886), 11 P.D. 176.

monial Causes Act, 1950, which grants jurisdiction to the court if a wife petitioner, though domiciled abroad, is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings.¹ Her husband, who was resident and domiciled in Natal, entered an appearance under protest and later himself began divorce proceedings in the Supreme Court of South Africa. He then applied to the High Court for a stay of the English proceedings.

Formidable objections were advanced against the continuance of the English action. If the wife were to obtain an English divorce, it would not relieve the husband of his married status in the eyes of South African law, since it would not have been granted by the courts of the common domicil of the parties. He would, therefore, be driven to continue the action that he had begun in South Africa and would thus incur much unnecessary expense. It was most desirable, he not unreasonably contended, that from the point of view of international validity, the court of the domicil should be preferred to all others in the matter of divorce.

Nevertheless, it was held that these objections did not warrant a stay of the English action. The husband had failed to satisfy the court that the wife would derive no advantages from suing as plaintiff in England as opposed to defending the South African action. On the contrary, the evidence showed that maintenance, which might be granted to her in the English action, was not obtainable in South Africa. Moreover, after it had become apparent that there was cause for complaint against the wife, there had been a somewhat inexplicable delay in the commencement of the South African proceedings.

The Court of Appeal in *McHenry v. Lewis*² suggested a distinction in the present context between courts in the British Empire and foreign courts in the wider sense of the term. It was there said that a plaintiff in English litigation, who commences another action in Scotland or in Ireland or in some other part of the British dominions, is on the same footing as a person who sues for the same matter in two separate courts in England, i.e. the double proceeding is *prima facie* vexatious and one of the actions will be stayed as a matter of course, the plaintiff being put to his election. If, however, the second action is started in a foreign country outside the British dominions, there is nothing inherently vexatious in the double proceeding. It is difficult to appreciate what justification there is for this distinction. The

Suggested
distinction
between
colonial
actions and
foreign
actions

¹ *Infra*, p. 347.

² (1882), 22 Ch.D. 397.

reason invariably advanced by the judges for the proposition that the prosecution of a foreign in addition to an English action is not in itself vexatious is that the litigant may possibly derive some distinct advantage from the foreign proceedings of which it is unjust to deprive him. If this is so, it seems clear that many parts of the British Empire should be ranged with non-British foreign countries, for in parts of the Empire, as, for instance, in South Africa, the rules and remedies are more remote from their English counterparts than those, say, of most of the States in North America. The same observation is true, though to a lesser degree, of Scottish law. Moreover, it has now been definitely held in two more recent decisions that the distinction has no application where the foreign suit is brought, not by, but against, the English plaintiff.¹ Thus if *A* sues *B* in Scotland, and then *B* sues *A* in England, *B*'s English action is not *prima facie* vexatious and will not be stayed in the absence of vexation in fact.² Even where both suits have been brought by the same plaintiff the distinction has not the support of Scrutton L.J.³

¹ *Cohen v. Rothfield*, [1919] 1 K.B. 410; *The London*, [1931] P. 14.

² *The London*, [1931] P. 14; *Heilmann v. Falkenstein* (1917), 33 T.L.R. 383; *The Janera*, [1928] P. 55.

³ *Cohen v. Rothfield*, [1919] 1 K.B. 410, 415.

PART II

PRELIMINARY TOPICS

CHAPTER V. THE PROOF OF FOREIGN LAW

**CHAPTER VI. THE EXCLUSION OF A FOREIGN LAW THAT
WOULD NORMALLY BE APPLICABLE**

CHAPTER VII. DOMICIL

CHAPTER V

THE PROOF OF FOREIGN LAW

THE established rule is that knowledge of foreign law, even of the law obtaining in some other part of the British possessions, is not to be imputed to an English judge.¹ Unless the foreign law with which a case may be connected is pleaded by the party relying thereon, the presumption is that it is the same as English law. The onus of proving that it is different, and of proving what it is, lies upon the party who pleads the difference.² If there is no such plea, the court must give a decision according to English law, even though the case may be connected solely with some foreign country.³

Knowledge of foreign law not imputed to English judges

The question as to what is the foreign law upon some particular matter, like other matters of which no knowledge is imputed to the judge,

'must be proved, as facts are proved, by appropriate evidence, i.e. by properly qualified witnesses',⁴

unless both parties agree to leave the investigation to the judge and to dispense with the aid of witnesses.⁵ It cannot be proved, for instance, by citing a previous decision of an English court in which the same foreign rule was in issue,⁶ or by referring to a decision in which a court of the foreign country has stated the

¹ *Nelson v. Bridport* (1845), 8 Beav. 547. In *Saxby v. Fulton*, [1909] 2 K.B. 208, 211, Bray J. said: 'I was asked to assume, in the absence of evidence, that the law in Monte Carlo is the same as in England as regards gaming, but I decline to make this assumption; it is notorious that at Monte Carlo roulette is not an unlawful game.' This is a heresy for which there is neither justification nor support.

² *The King of Spain v. Machado* (1827), 4 Russ. 225, 239; *Male v. Roberts* (1800), 3 Esp. 163.

³ *Warner Bros. v. Nelson*, [1937] 1 K.B. 209.

⁴ *Nelson v. Bridport*, *supra*, per Lord Langdale, at p. 536; *Beatty v. Beatty*, [1924] 1 K.B. 807, 814; *Lazard Bros. & Co. v. Midland Bank*, [1933] A.C. 289. This is by no means a universal law. By German law, for instance, foreign law requires proof only to the extent to which it is unknown to the judge. The judge is not confined to material put before him by the parties, but may use his own sources of information.

⁵ *Jabbour (F. & K.) v. Custodian of Israeli Absentee Property*, [1954] 1 W.L.R. 139, 147-8.

⁶ *Lazard Bros. & Co. v. Midland Bank*, *supra*; *McCormick v. Garnett* (1845), 23 L.J. (Ch.) 777; *In re Marseilles Extension Ry. & Land Co.* (1885), 30 Ch.D. 598, 602.

meaning and effect of the law in question.¹ Those parts of the United Kingdom, however, for which the House of Lords is the ultimate appellate tribunal form an exception to these rules. Thus Scottish law must be proved by evidence in the courts inferior to the House of Lords, but in the House of Lords itself, which is the *commune forum* of both England and Scotland, it is a matter of which their Lordships have judicial knowledge.² The English courts have not adopted the Continental practice according to which a Government may be requested to give an official statement of the law upon some particular matter. By the British Law Ascertainment Act, 1859, however, a court within Her Majesty's Dominions, which is of opinion that it is necessary or expedient for the disposal of a case to ascertain the law of some other part of Her Majesty's Dominions, may remit to a superior court in the latter place the question of law upon which a ruling is required. A similar course may be taken under other statutes in the case of Protectorates, Mandated Territories, or even foreign countries.³

Effect of the evidence to be decided by the judge alone Foreign law had formerly to be proved to the satisfaction of the jury, but the Supreme Court of Judicature Act,⁴ 1925, has now provided as follows:

Where it is necessary to ascertain the law of any other country which is applicable to the facts of the case, any question as to the effect of the evidence given with respect to that law shall, instead of being submitted to the jury, be decided by the judge alone.

What witnesses are competent It is obvious that no witness can speak to a question of law as a fact and that all he can do is to express his opinion. The rule is, therefore, that he must be an expert. The question as to who is a sufficient expert in this matter has not been satisfactorily resolved by the English decisions.⁵ Though no doubt the court has a discretion in the matter, the general principle is that no person is a competent witness unless he is a practising lawyer in the particular legal system in question, or unless he occupies a position or follows a calling in which he must

¹ *Beatty v. Beatty*, [1924] 1 K.B., at pp. 814-15; *Guaranty Trust Company of New York v. Hannay & Co.*, [1918] 2 K.B. 623, 638, 667.

² *Elliot v. Joicey*, [1935] A.C. 209, 236.

³ Foreign Jurisdiction Act, 1890, s. 5, Sched. 1 (British Protectorates and Mandated Territories); Foreign Law Ascertainment Act, 1861 (foreign countries). A remission must not be made under these Acts unless these provisions have been extended by Order in Council to the foreign country in question.

⁴ S. 102, replacing Administration of Justice Act, 1920, s. 15. The Act applies to criminal trials, *R. v. Hammer*, [1923] 2 K.B. 786.

⁵ Falconbridge, op. cit., pp. 833-8.

necessarily acquire a practical working knowledge of the foreign law. In other words, practical experience is a sufficient qualification. Thus, in accordance with this principle:

Practical
experience
a sufficient
qualifica-
tion

A Roman Catholic bishop was allowed to testify to the matrimonial law of Rome, since a knowledge of its provisions was essential to the performance of his official duties:¹

A hotel-keeper in London, a native of Belgium, who had formerly been a commissioner of stocks in Brussels, was admitted to prove the Belgian law of promissory notes, on the ground that his business had made him conversant with mercantile law:²

An ex-Governor of Hong Kong was held competent to prove the law of that colony:³

A secretary to the Persian Embassy was allowed to depose to the law of Persia, upon it being shown that there were no professional lawyers in that country, but that all diplomatic officials had to be thoroughly versed in the law:⁴

Where it was necessary to ascertain the meaning of a bill of exchange given in Chile, the evidence of a London bank director with long experience of banking in South America was preferred to that of a young man who had been at the Chilean Bar for four years.⁵

The view taken by the courts is that a mere academic knowledge of foreign law scarcely qualifies a man as an expert witness. Thus in *Bristow v. Sequeville*,⁶ where it was necessary to prove the law in force at Cologne, a witness was called who stated that he was a jurist and legal adviser to the Prussian consul in England, and that having studied law at Leipzig University he knew from his studies there that the Code Napoléon applied in Cologne. It was held that he was not a competent witness, Alderson B. saying:

Academic
knowledge
not a suffi-
cient quali-
fication

‘If a man who has studied law in Saxony, and has never practised in Prussia, is a competent witness, why may not a Frenchman, who had studied the books relating to Chinese law, prove what the law of China is?’

But although it has been said that study alone is not sufficient qualification,⁷ the Courts have not consistently observed the

¹ *The Sussex Peerage Case* (1844), 11 Cl. & Fin. 85; distinguish *R. v. Savage* (1876), 13 Cox C.C. 178.

² *Vander Donckt v. Thellusson* (1849), 8 C.B. 812; distinguish *Perlak Petroleum Maatschappij v. Deen*, [1924] 1 K.B. 111.

³ *Cooper-King v. Cooper-King*, [1900] P. 65.

⁴ *In the Goods of Dhost Aly Khan* (1880), 6 P.D. 6.

⁵ *De Betche v. South American Stores*, [1935] A.C. 148.

⁶ (1850), 19 L.J., Ex. 289; *In the Goods of Bonelli* (1875), L.R. 1 P.D. 69.

⁷ *In re Turner* (1906), W.N. 27, per Kekewich J.

requirement of practical experience. Thus the Reader in Roman-Dutch Law to the Council of Legal Education, who had made a special study of that law for the purpose of his lectures, was admitted to testify to Rhodesian law;¹ an English barrister, who in the course of his profession had made researches into the marriage laws of Malta, was held competent to prove the validity of a marriage which had been solemnized at Valletta;² and in another case evidence as to the law of Chile was admitted from an English solicitor who, though never a practitioner in that country, stated that he had considerable experience of its laws.³

Court not bound by the evidence The evidence of the expert may exceptionally be given by affidavit, but it is usually given orally, and if so he is of course open to cross-examination. Although he must state his opinion as based upon his knowledge or practical experience of the foreign law, he may refer to codes, decisions or treatises for the purpose of refreshing his memory, but in such an event the court is at liberty to examine the law or passage in question in order to arrive at its correct meaning.⁴ Again, if there is a conflict of testimony between the expert witnesses on either side, the court must place its own interpretation upon the foreign law in the light of the evidence given.⁵ In all cases, in fact, it is the right and the duty of the court to criticize the evidence.⁶

‘The witness, however expert in the foreign law, cannot prevent the court using its common sense; and the court can reject his evidence if he says something patently absurd, or something inconsistent with the rest of his evidence, . . . Subject to the above qualification, or rather explanation, the rule that our courts must take the foreign law from the expert witness in that law is universal.’⁷

¹ *Brailey v. Rhodesia Consolidated Ltd.*, [1910] 2 Ch. 95; and see *Barford v. Barford*, [1918] P. 140.

² *Wilson v. Wilson*, [1903] P. 157.

³ *In the Goods of Whitelegg*, [1899] P. 267.

⁴ *Concha v. Murietta* (1889), 40 Ch.D. 543; *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1923] 2 K.B. 630, 643; *In re Cohn*, [1945] Ch. 5; see 61 L.Q.R. 340. *De Belche v. South American Stores Ltd. and Chilean Stores Ltd.*, [1935] A.C. 148, 158-9.

⁵ *Craster v. Thomas*, [1909] 2 Ch. 348, 357; *Trimbey v. Vignier* (1834), 1 Bing. (N.C.) 151; *Di Sora v. Phillips* (1863), 10 H.L.C. 624, 636-42, per Lord Chelmsford; *De Bode's Case* (1844), 8 Q.B. 208, 266; *Lazard Bros. v. Midland Bank*, [1933] A.C. 279, 298.

⁶ *Tallina Laevauhisus (A/S) v. Estonian State S.S. Line* (1947), 80 LL.L. Rep. 99, 108, per Scott L.J.; *Rouyer Guillet et Cie v. Rouyer Guillet & Co. Ltd.*, [1949] 1 All E.R. 244.

⁷ *Tallina Laevauhisus (A/S) v. Estonian State S.S. Line*, *supra*, per Scott L.J.

CHAPTER VI

THE EXCLUSION OF A FOREIGN LAW THAT WOULD NORMALLY BE APPLICABLE

1. Foreign revenue laws. *Pages* 133-5.
2. Foreign penal laws. *Pages* 135-50.
3. Foreign laws repugnant to English public policy. *Pages* 150-8.

IT is obvious that circumstances will occasionally arise in which the *lex fori* must be preferred to the foreign law that would normally be applicable to the case. An outstanding example of this is the Continental doctrine of *ordre public* under which any domestic rule designed to protect the public welfare must prevail over an inconsistent foreign rule. The danger of a doctrine so vague as this is that it may be interpreted to embrace such a multitude of domestic rules as to provide a fatally easy excuse for the application of the *lex fori* and thus to defeat the underlying purpose of private international law.¹ The analogous English doctrine, though less unruly, is indeed not above suspicion in this respect. Summarily stated, it withholds recognition from any foreign law which is of a penal or revenue nature, or which is repugnant to the distinctive policy of English law.

Impossibility of recognizing all foreign laws

We will now deal separately with these three cases.

1. *Foreign revenue laws.*²

Ever since Lord Mansfield's remark in 1775 that 'no country takes notice of the revenue laws of another'³ it has been the traditional view that no action lies in England for the recovery of a tax or other monetary imposition levied by a foreign State or by a foreign municipal authority. This unco-operative attitude, though it obviously provides a ready means for tax evasion, has been justified from time to time on several different grounds, as, for instance, that the imposition of a tax rests on the exercise of power and that therefore it is equivalent

Foreign taxes not recoverable by action

¹ See the remarks of Baty, *Polarized Law*, p. 170.

² See especially 3 *I. & C.L.Q.R.* 465 et seqq. (Michael Mann); and the judgment of Kingsmill Moore J. in the Irish case of *Peter Buchanan Ltd. & Macharg v. McVey*, now reported [1955] A.C. 516. See also 30 *B.Y.B.I.L.* 459-65.

³ *Holman v. Johnson* (1775), 1 Cowp. 341, 343.

in substance to the imposition by a foreign sovereign of a penalty, the recovery of which has consistently been refused by the English courts.¹ Another explanation, based upon the fundamental principle that any foreign law which conflicts with public policy as understood in England will be rejected, is that if the recovery of a foreign revenue debt were allowed it would still be necessary to consider whether the foreign policy leading to the creation of the debt offended the accepted policy of England, an inquiry calculated to cause political embarrassment and altogether too delicate for a judge to undertake.²

The
judicial
authority
for the
rule

Until recently, positive authority for the complete disregard of foreign revenue laws was, perhaps, a little nebulous, since the direct recovery of a foreign tax had been attempted on only two occasions. In 1909, the Municipal Council of Sydney sued to recover a contribution imposed by a local statute in respect of certain street improvements effected in the area where the defendant owned property;³ in 1928, the Dutch Government claimed the right to have succession duty deducted from the English assets of a Dutch national who had died domiciled in Holland.⁴ Both these attempts failed, but in each case the decision was that of a judge of first instance and the suspicion lingered that if the occasion were to arise a higher court might take a different view of the matter. Finally, all doubts were stilled in 1955 by the decision of the House of Lords in *Government of India v. Taylor*,⁵ where the facts were as follows:

The Delhi Electric Supply and Traction Co. Ltd., which was a company registered in England but carrying on business in India, sold its business to the Indian Government for a sum of money which it remitted to England as soon as received. After the company had gone into voluntary liquidation, a demand was made upon it by the Indian Commissioner of Income Tax for the payment of a large sum of income tax in respect of the capital gain derived from the sale of the business. The commissioner claimed to prove for this debt in the liquidation, but his claim was rejected by the liquidator. Vaisey J. and the Court of Appeal having upheld this rejection,⁶ the matter was taken to the House of Lords.

¹ *Infra*, p. 135.

² See the remarks of Judge Learned Hand, in *Moore v. Mitchell* (1929), 30 F. (2d) 600, 604, approved by Kingsmill Moore J., *Peter Buchanan Ltd. & Macharg v. McVey*, [1955] A.C. 516, 528-9.

³ *Municipal Council of Sydney v. Bull*, [1909] 1 K.B. 7.

⁴ *In re Visser*, [1928] 1 Ch. 877.

⁵ [1955] A.C. 491.

⁶ Decision of the Court of Appeal *sub nom. In re Delhi Electric Supply & Traction Co. Ltd.*, [1954] Ch. 131.

It was argued for the appellants that the alleged rule excluding the recognition of foreign revenue laws did not extend to taxes similar to those imposed in England, but was confined to penal laws, and that in any event it demanded modification in the case of a foreign country belonging to the British Commonwealth of Nations. Further, it was said that the rule, even if accepted *in toto*, did not apply to liquidation proceedings, for a liquidator is under a statutory duty to discharge all the 'liabilities' of the company, which is a word of wide import not confined to debts directly enforceable by action.

These arguments were rejected. Their Lordships were unanimous in holding that the rule expressed by Lord Mansfield rested on a solid basis of authority and convenience. They also held, with one dissentient,¹ that the duty of a liquidator in the winding up of a company is confined to the discharge of such liabilities as are legally enforceable.

2. *Foreign penal laws.*

The concern of private international law is with private, not public, claims, and one of its best-established principles in England is that the penal laws of foreign countries are strictly local and that they affect nothing more than they can reach by virtue of their own authority.² Thus in the early case of *Folliott v. Ogden*,³ a bond for borrowed money had been made before the Declaration of Independence by *B* in favour of *A*, both parties being British subjects resident in New York. Later, during the war, the State of New York confiscated the property of *A*. To an action which *A* brought in England after the treaty of peace to recover the money due on the bond, *B* pleaded that *A* had been deprived of his rights under the instrument by the legislature of New York. Buller J., however, summarily dismissed the plea as follows:

Foreign
penal laws
disregarded
in England

'A very few words are sufficient to decide the present case. It is a general principle that the penal laws of one country cannot be taken notice of in another. Then apply that principle to the present case. This is an action on a bond, to which the defendant has pleaded that by the penal laws of another country the property of the plaintiff in the bond has been divested out of him; but this court cannot take notice of

¹ Lord Keith.

² *Folliott v. Ogden* (1789), 3 T.R. 726, *per* Lord Loughborough, approved in *Wolff v. Oxholm* (1817), 6 M. & S. 92; *Banco de Vizcaya v. Don Alfonso de Borbón y Austria*, [1935] 1 K.B. 140.

³ *Supra*.

that defence; and then all the proceedings are a nullity and the action remains unanswered.¹

A modern case to the same effect is *Banco de Vizcaya v. Don Alfonso de Borbón y Austria*.¹ The facts were that the ex-King of Spain had bought certain securities with his own money, and had instructed that they should be held by a London bank to the order of his agents, the Banco de Vizcaya, a Spanish concern. The Spanish Republican Government later decreed that all his property should be confiscated and that anything deposited with Spanish banks should be delivered to the Treasury. In an action by the King to recover his securities, the plea that he had been deprived of his ownership by the Spanish Government failed, Lawrence J. pointing out that to admit it would be to carry into effect what was admittedly a penal law of a foreign State.¹

Test for deciding whether foreign law is penal A foreign law is not deemed to be penal in nature within the meaning of the principle now under discussion unless its enforcement rests with the State or with the community which the State represents.² The word 'penalty' as used by lawyers is both wide and ambiguous, but nothing is regarded as a penalty in the present connexion unless it is

'recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer'.³

It has been held that the English court must itself classify the law and must not necessarily adopt the view that is taken by the courts of the foreign country in question.⁴ Otherwise it might well happen that a right would be allowed in one case and disallowed in another merely because it arose in different countries.

The whole subject is well illustrated by *Huntington v. Attrill*,⁵ where the facts were as follows:

A New York statute, designed *inter alia* to protect the public against company promoters, provided that the directors of a corporation should be personally liable for its debts upon proof that false reports of its financial condition had been published. Sums recoverable under this provision were payable to creditors in satisfaction *pro tanto* of their

¹ [1935] 1 K.B. 140. A similar case is *Frankfurter v. W. L. Exner Ltd.*, [1947] Ch. 629; 27 *B.Y.B.I.L.* 364.

² *Huntington v. Attrill*, [1893] A.C. 150 (P.C.).

³ *Huntington v. Attrill*, *supra*, *per curiam* at pp. 157-8.

⁴ *Huntington v. Attrill*, *supra*.

⁵ [1893] A.C. 150.

claims. A creditor instituted a suit under the statute in a New York court and obtained judgment for a large sum. He later brought an action on the judgment in Ontario. The New York courts had decided that actions brought under the statute were of a penal character.

The Privy Council held, first, that it was for the Ontarian court to put its own interpretation upon the statutory provision, and secondly, that the statute was remedial, not penal, since it permitted a subject to enforce a liability in his own interests and for the protection of his own private rights.

A somewhat troublesome question is the extent to which foreign expropriatory legislation is recognized in England when it is directed, not against a particular person as in *Don Alfonso's Case*, but against national property generally.¹ It would seem that legislation of this nature may take three forms:

Does foreign expropriatory legislation have extra-territorial effect?

First, *requisition*, which term is generally confined to the seizure of property in the public interest for a limited period, usually until the end of some emergency, and in return for compensation.²

Secondly, *nationalization*, which is the permanent absorption of property into public ownership in return for compensation.

Thirdly, *confiscation*, which is the permanent seizure of private property without payment of compensation.

The main question of private international law in this connexion, and it is a question of the choice of law, is whether a decree of requisition or of confiscation made by the sovereign power in country *X* affects property, whether belonging to nationals or to foreigners, that is situated at the time of the decree outside the territory of *X*.

The general principles that have a bearing upon the question defy simple harmonization, for against the principles that neither foreign legislation nor foreign penal laws have extra-territorial effect, stands the equally fundamental doctrine that a foreign sovereign cannot be impleaded. If, for instance, the Soviet Government obtains possession in Cardiff of a

Conflicting principles applicable to the question

¹ See 21 *B.Y.I.L.* 180 et seqq.; 59 *L.Q.R.*; *Annual Digest and Reports of Public International Cases*, for the various years from 1935 (see indices thereto); 31 *Transactions of Grotius Society*, 30 et seqq.; 13 *M.L.R.* 69 et seqq.; Wolff, pp. 525-9.

² "The word *requisition*, while not a term of art, is familiar and has been constantly used to describe the compulsory taking by Government, invariably or at least generally for public purposes, of the user, direction and control of the ship with or without possession, per Lord Wright in *The Cristina*, [1938] A.C. 485, 502.

Russian merchant vessel on the ground that it falls within the scope of a Soviet decree of confiscation and if the decree is not regarded by English law as applicable to property in England, how can this view be rendered effective against a sovereign power that is immune from the jurisdiction?

Doubtful whether ships in a separate category Another fact that militates against a simple generalization of the law is whether all forms of property stand on the same footing for the purpose of determining the effect of expropriation. The suggestion, by no means unsupported by authority, has been made that a merchant ship stands in a category of its own, since it has a permanent *situs* in the country to which it belongs.¹ If this is correct a State which requisitions or confiscates its national ships exercises a quasi-territorial, not an extra-territorial, act of authority.

Factors upon which the law turns: If an English judge is required to determine the effect of foreign expropriatory legislation, his decision will depend upon three main factors, namely, the construction of the foreign legislation, the *situs* of the property at the time of the legislative decree, and the question whether the foreign sovereign was in actual possession or control of the property outside his territory at the time when the facts giving rise to the litigation occurred. The present law appears to be as follows.

(1) Property within the foreign jurisdiction at time of decree The English courts recognize without hesitation that the ownership of property is conclusively and finally determined by the terms of the foreign decree of expropriation, if the property is situated within the jurisdiction of the sovereign at the time of the decree, notwithstanding that it is later brought to England and is still there at the time of the action. For instance, in *Luther v. Sagor*:²

Timber, situated in Russia and belonging to the plaintiffs, a private company incorporated according to the law of Russia, was seized by the Soviet authorities under a decree that had nationalized all profits belonging to industrial and commercial establishments. Part of the timber was later brought to England and there sold to the defendants by a Soviet agent. The plaintiffs sued for damages in trover on the ground that the ownership of the timber was still vested in them.

¹ 31 *Transactions of Grotius Society*, 30 et seqq. (Sir Arnold McNair).

² [1921] 3 K.B. 532, 548. Followed in *Princess Paley Olga v. Weisz*, [1929] 1 K.B. 718. *Quære* whether the decision would be the same if the owner escaped with his property from the country after the decree but before he had been deprived of possession by the local authorities. Cp. *Don Alonso de Velasco v. Corneros* (1612), Hobart 212, also *sub nom. Sir John Watts* 2 Brownl. and Golds. 29, cited 13 *M.L.R.* 70, where, however, it is doubtful whether the correct interpretation has been put upon the decision; see Sack, *op. cit.*, pp. 363-4.

The Court of Appeal, on grounds which were not identical, found for the defendants.¹

In the view of Warrington L.J., no sovereign State must sit in judgment upon the acts of another foreign State affecting property within its own territory.

'It is well settled that the validity of the acts of an independent sovereign Government in relation to property and persons within its jurisdiction cannot be questioned in the courts of this country.'²

Banks L.J. found it impossible to ignore the law of Russia, the *lex situs* at the time of the decree, under which the seller had acquired a good title to the goods.³ Scrutton L.J., following perhaps a more doubtful line of reasoning, argued that, since the doctrine of immunity would have prevented any investigation of the Russian sovereign's title had the timber been found in England in the possession of a Russian official, it followed that no such investigation was possible where possession had been given to a private purchaser. 'What the court cannot do directly, it cannot do indirectly.'⁴

But surely the simple and decisive justification of the decision is the rule that a title to movables, valid according to the *lex situs* at the time of its acquisition, is recognized by English law.⁵ The law of the *situs* must prevail in such circumstances unless the rule of that law under which the title has been acquired is so immoral or so alien to the principles of justice as understood in England that it must be disregarded as being contrary to public policy. The Court of Appeal considered this objection, but found it impossible to regard the nationalization decree as anything else but the expression of a policy, designed, whether mistakenly or not, to promote the best interests of Russians.

The *lex situs* is decisive

The question is whether the principle of *Luther v. Sagor* applies where the confiscated property, though situated within the jurisdiction of the confiscating State, belongs to aliens. This was the main issue raised in *Anglo-Iranian Oil Co. v. Jaffrate*, better known as *The Rose Mary*,⁶ where the facts were as follows:

Are non-nationals bound by the *lex situs*?
Case of *The Rose Mary*

By an agreement made in 1933, the Persian Government granted to the plaintiffs the exclusive concession of extracting petroleum from

¹ For a critical appraisalment of the decision see Dr. K. Lipstein in 35 *Transactions of the Grotius Society*, 157 et seqq.

² [1921] 3 K.B. 532, at pp. 548-9.

³ *Ibid.*, at p. 545.

⁴ *Ibid.*, at pp. 555-6.

⁵ See the remarks of Devlin J. in *Bank voor Handel en Scheepvaart N.V. v. Slatford*, [1953] 1 Q.B. 248, 260.

⁶ [1953] 1 W.L.R. 246.

a certain area in Persia for a period ending on December 31, 1993, and undertook not to alter the agreement by legislation.

In 1951, the Government nationalized and expropriated all property vested in the plaintiffs by the concession. In the view of the judge in the present action this expropriation was accompanied by no more than a vague offer to consider the payment of compensation at some undefined time in the future.

The company formed by the Persian Government to manage the confiscated oil industry sold 400,000 tons of crude oil to an Italian, who in turn sold 900 tons to the Swiss charterers of the vessel, *Rose Mary*. This vessel, loaded with the oil, put into Aden harbour, whereupon the plaintiffs sued the ship-owners, the master and the charterers in detinue claiming either delivery of the oil or a declaration that it was their property.

Campbell J. found for the plaintiffs. *Luther v. Sagor*, in his considered opinion, is confined to a case where the confiscated property belongs to a national of the confiscating State. Public International Law, as incorporated in English law, ordains that to deprive a non-national of his property without the payment of adequate compensation is an illegal act.

'I am satisfied,' he said, 'that, following international law as incorporated in the domestic law of Aden, the court must refuse validity to the Persian Oil Nationalization Law in so far as it relates to nationalized property of the plaintiffs which may come within its territorial jurisdiction. I find the oil in dispute to be still the property of the plaintiffs.'¹

Two
distinct
questions

This decision must inevitably attract general sympathy, if only on the grounds of natural justice, but nevertheless it is submitted with the greatest respect that it is not beyond reproach, since, as a learned writer has shown in a convincing manner, it fails to distinguish two quite separate issues.¹ The first is whether the legislative power of a foreign sovereign to confiscate property within his own jurisdiction without the payment of compensation is open to question in the courts of other countries. The second question, presuming that the first must be answered in the negative, is whether, having effectively carried out the act of confiscation, the sovereign is bound by public international law to compensate non-nationals who have been dispossessed of their property.

(a) Is ex-
propriation
effective
though no
compensa-
tion paid?

It seems unarguable that the first question admits of only one answer. On what possible ground can an English court deny the *effectiveness* of legislation passed by a foreign sovereign State, recognized as such by Great Britain, in so far as it

¹ D. P. O'Connell in 4 *I. & C.L.Q.R.* 267 et seqq.

affects property situated within its own territorial domain? On principle, recognition of the act of confiscation must be complete, not partial. It cannot be made to turn upon the nationality of the victim, for even foreigners who choose to submit themselves or their business arrangements to a territorial law must resign themselves to the consequences of a relevant and territorial act of sovereignty.¹ Even on practical grounds the contrary view would avail nothing, for legislative capacity is coincident with power, and short of war no foreigner can resist an act of power exercised within the territorial limits of a sovereign Government. If this truism is accepted, it follows that the right of exploitation in the Persian oilfields had reverted in the Persian sovereign by virtue of the *lex situs*. Therefore, the ownership of the 900 tons of oil shipped on *The Rose Mary* passed to the Italian buyer, also by virtue of the *lex situs*, and there was no principle of private international law which would justify the divesting of his title by a foreign court. In a later case, Upjohn J. came to the conclusion that *Luther v. Sagor* laid down principles of general application not limited to nationals of the confiscating State, and that the English courts do not regard confiscation without compensation as *per se* a ground for refusing to recognize foreign legislation.²

This, however, does not conclude the matter. It is one thing to recognize that an owner has been effectively dispossessed of his property by a confiscatory decree, another to deny him a personal remedy. It is at this point that the second question becomes relevant—does public international law demand that a sovereign State shall compensate a non-national whom it has dispossessed? It is, indeed, difficult to resist the argument that on principle the dispossessed person acquires a contractual or an equitable right to compensation. He cannot succeed in detinue and he cannot demand the remedy of specific performance, for it is not open to him to deny the validity of the confiscatory legislation, but it is no reflection upon the right of a sovereign State to dispose of property for the supposed good of the community to claim that it shall make reparation for any

(b) Is there a contractual right to compensation?

¹ *In re Claim by Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, 348, *per* Upjohn J. The learned judge disclaimed any intention to challenge the correctness of the decision in *The Rose Mary*, but presumably this was because the Persian legislation was aimed at confiscating the property of particular persons (p. 346) as in *Don Alfonso's Case*, *supra*, p. 136. But in that case the property was in England at the time of the confiscatory decree and so out of the reach of the Spanish sovereign. Therefore, the two cases are not *in pari materia*.

² *In re Claim of Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, 348.

resultant breach of contract. At the lowest, there is an obligation arising *ex aequo et bono* that there should be restitution of the amount by which the State has been unjustly enriched. Speaking of the *Rose Mary Case*, an acute commentator has well said:

'A concessionaire may have his rights *ex contractu* abrogated by unilateral action, but that by no means represents the termination of his equitable interest in the works constructed by him. That interest may be said to give rise to a new obligation, of restitutionary or quasi-contractual character, on the part of the State which benefits from the expropriation. In municipal law effect may be denied to this restitutionary principle by virtue of an act of sovereignty; in international law no such act of sovereignty renders a State competent to destroy the equitable interest of a foreign investor. That interest falls within the category of "acquired right".'¹

It can at least be said that this equitable right forms a solid basis for a diplomatic claim.

(2) Property outside the foreign jurisdiction at time of decree If the property was outside the territory of the confiscating or requisitioning sovereign at the time of the decree, whether in England, in a foreign country or on the high seas, the first task of the judge is to construe the decree in order to ascertain whether it is in terms confined to property within the jurisdiction or whether it purports to affect property *extra territorium*. It is for the judge to form his own opinion on this question after hearing the evidence of expert witnesses.²

(a) Decree not intended to be extra-territorial If he comes to the conclusion that the decree was not intended to affect property in other countries or on the high seas, *cadit quaesitio*. This was the substantial ground upon which the House of Lords held in *Lecouturier v. Rey*³ that a French statute, by which the Carthusian monks had been expelled from France and deprived of their property, did not disable them from exploiting in England, to the exclusion of the French liquidator, the reputation which the liqueur known as Chartreuse, and which they continued to manufacture in Spain according to a secret formula, had obtained in England. The statute neither expressly nor by implication affected property outside France.

(b) Decree intended to be extra-territorial If, on the other hand, the judge comes to the conclusion that the foreign legislation is intended to have extra-territorial operation, the first general principle to be considered is that

¹ D. P. O'Connell, 4 *I. & C.L.Q.R.* 270-1.

² As was done for instance by Hill J. in *The Jupiter* (No. 3), [1927] P. 122.

³ [1910] A.C. 262; *The Jupiter* (No. 3), [1927] P. 122.

legislation has no extra-territorial effect. Jurisdiction is coincident with power, and how can power be exerted within the territory of another sovereign?¹ Speaking of a foreign State, it is said in Dicey:

'From the point of view of English courts it has no authority to legislate for, or adjudicate upon, things or persons not within its territory, except in virtue of some English rule of the conflict of laws.'²

The clear implication of the territorial principle is that property situated, say, in England cannot be affected by a foreign decree of expropriation and that the rights of the owner remain unimpaired. The only doubt is whether the decree is effective against a national of the foreign State, since historical authority is not lacking for the view that the right to expropriate property may be based upon the allegiance of its owner as well as upon its *situs*.³ Whether this view is correct or not, it has found few adherents in recent years.⁴ Thus in one case Maugham J. held that a Soviet confiscatory decree was ineffective with regard to property in England although the owner was a Russian subject at the time of the decree.⁵ The application of the principle, however, that the legislative power of a State is only territorial, may be frustrated by the impact of the equally well established principle that a foreign sovereign cannot be impleaded, for if the sovereign is in possession or control of the expropriated property, even though it may be in England, how is the owner to enforce his rights? This conflict of doctrine requires us to consider the law under two heads,

first, where the foreign sovereign has obtained possession or control of the property,

secondly, where the previous owner or a third party is still in possession.

If the property is in England at the time of the proceedings and if at that time it is in the possession or under the control of the foreign State, the dispossessed owner can take no steps to challenge the validity of the expropriation, for to do so would

(i) If foreign sovereign in possession, decree is effective

¹ Dicey, p. 13. *Jabour (F. & K.) v. Custodian of Israeli Absentee Property*, [1954] 1 W.L.R. 139, at p. 150, and authorities there cited.

² Dicey, p. 14. In the previous edition, the words 'unless they are its subjects' were added after 'persons' (5th ed.), p. 20.

³ 31 *Transactions of the Grotius Society*, 35 et seqq. (Sir Arnold McNair). It is significant that Dicey conceded to a State the right to legislate for its subjects outside its territory, *supra*, note 2.

⁴ But see *Lorenzen v. Lydden & Co.*, [1942] 2 K.B. 202; *infra*, p. 146.

⁵ *In re Russian Bank for Foreign Trade*, [1933] 1 Ch. 745.

be to implead a foreign sovereign.¹ This is also the position where, although the sovereign is not directly impleaded, 'relief *in rem* is sought in his absence against property owned by him or in his possession or control'.² This rule is a normal example of the doctrine of immunity, but nevertheless it contains the seeds of much injustice, unless the means by which the sovereign has obtained possession are examinable by the court. If, for instance, his consul obtains possession of a ship lying in an English port by over-persuading, threatening or tricking³ the master and recovery is later sought by the owner, is the sovereign to be allowed to say: 'I am in possession, I therefore cannot be impleaded'? If this plea is available to him, the English court in effect admits the extra-territorial operation of a foreign decree and allows it to deprive an owner of property situated in England. Presumably the court would relieve an owner against a forcible seizure of possession, but as the cases stand it is doubtful whether an unduly restricted meaning has not been given to the word 'forcible'. In *The Cristina*:⁴

The Spanish Republican Government requisitioned all ships registered at Bilbao. A ship falling within this category was berthed at Cardiff. The Spanish consul boarded her, disclosed the requisitioning decree, dismissed the master and put a new master in command. The owners issued a writ *in rem* and claimed possession of the ship.

It was held by the House of Lords that jurisdiction must be declined since the ship was in the possession of a foreign sovereign State. It is arguable, however, that such an eviction of a servant by a State official is nothing more than a forcible invasion of the owner's proprietary rights. Perhaps the decision does not formulate a general rule, for the Law Lords considered that the Republican Government had requisitioned, not con-

¹ *The Cristina*, [1938] A.C. 485; *The Arraiz* [1938], 61 LL.L. Rep. 140; *The El Neptuno* (1938), 62 LL.L. Rep. 7; *The Arantzazu Mendi*, [1939] A.C. 256; *Dollfus Mieg et Compagnie S.A. v. Bank of England*, [1949] Ch. 369.

² *Dollfus Mieg et Compagnie S.A. v. Bank of England*, *supra*, at p. 384.

³ See, for example, *The Abodi Mendi*, [1939] P. 178, where the consul of the Spanish Republican Government was unable to obtain possession of a Spanish ship in an English harbour owing to the firm attitude of the master, an adherent of General Franco. But later, on returning from a walk, the master found that the Republican crew had removed the gangway and were in physical possession of the ship. Since the Republican Government had previously issued a writ *in rem* against the ship and she was in charge of the marshal, this forcible exclusion of the master was held to be a contempt of court.

⁴ [1938] A.C. 485.

fiscated, the ship, and Lord Thankerton was careful to stress that possession had been obtained 'without a breach of the peace'.¹

If property is not in the possession or control of the foreign sovereign at the time of the proceedings and if it was outside the territorial jurisdiction of the sovereign at the time of the expropriatory decree, it is now established, after several dicta to the same effect, that the rights of the owner are unaffected.² A contrary rule would conflict not only with the principle that legislative power is territorial, but also in the particular case of confiscation with the doctrine that the penal laws of another country can have no force in England.³ Since the sovereign is not in possession at the time of the proceedings, the principle that he cannot be impleaded has no application, for until his right of ownership or possession has been proved it cannot be said that his title is impugned.⁴

(ii) If foreign sovereign not in possession, decree has no extra-territorial effect

Owing to the decision of Atkinson J. in *Lorentzen v. Lydden & Co.*,⁵ however, it was for some time doubtful whether an extra-territorial effect should not be attributed to the requisition, as distinct from the confiscation, of property by a foreign sovereign. It is true, of course, that a requisition differs fundamentally from a confiscation of property. The former is not spoliation, but a reasonable means of meeting a national emergency. But if it is to be allowed a wider effect than is permissible to confiscation, the difficulty remains of determining the category into which a particular seizure falls. There is no magic in words. To call a seizure a requisition does not make it one. It must satisfy certain tests. It must be for the public good, for a limited time, and compensation must be paid. But the task of a judge required to consider these somewhat elusive and ambiguous factors will not be simple. Is he to apply the ordinary rules of the English law of contract? Is, for instance, a mere promise by the foreign sovereign to retain the property only for a limited time or to pay compensation sufficient to raise the seizure into the higher category? If so, if promise is to be equated with performance, which is a view

Does a requisition in contrast with confiscation have extra-territorial effect? Obstacles to treating requisition differently

¹ Ibid., at p. 493.

² *Tallina Laevauhisus (A/S) v. Estonian State S.S. Line* (1947), 80 LL.L. Rep. 99; *Cheshire and Another v. Frederick Huth & Co.* (1928), 79 LL.L. Rep. 262; *Novello v. Hinricksen Edition*, [1951] Ch. 595; *Bank voor Handel en Scheepvaart N.V. v. Slatford*, [1953] 1 Q.B. 248.

³ *Frankfurther v. W. L. Exner Ltd.*, [1947] Ch. 629, pp. 636-7.

⁴ *Haile Selassie v. Cable and Wireless Ltd.*, [1938] Ch. 839; *supra*, p. 93.

⁵ [1942] 2 K.B. 202.

that has been taken by the French courts,¹ rapacity may indeed be well served. As an Austrian lawyer has said:

"The whole purpose of the non-enforcement of foreign confiscations could be stultified, if the confiscating State were to take the precaution of including some hypocritical assurances of an eventual payment of some nugatory indemnity in its confiscatory decrees."²

Again, if compensation has been promised or even paid, is its adequacy a relevant factor? If not, what is in effect a forced sale at a derisory price may receive extra-territorial recognition. If, on the other hand, the amount of compensation is to be scrutinized, the practical difficulties will be great and the interference of the court may be regarded as an affront by the foreign sovereign.

Lorentzen v. Lydden & Co. Nevertheless, in *Lorentzen v. Lydden & Co.*, Atkinson J. held that a decree of the Norwegian Government, issued on the eve of its escape to England in 1940, requisitioning in return for confiscation Norwegian ships lying outside German-occupied harbours, entitled the Government to recover damages for breach of contract from the charterer of one of these ships. In other words, the decree effectively passed the ownership of the *chose in action* situated in England. His main reasons were these: the decree affected only Norwegian subjects; it expressly referred to ships outside Norway; it was not confiscatory in nature; its enforcement was demanded by public policy.³ Thus, the learned judge felt unmoved by the earlier decision of the Inner House of the Court of Session in the case of the *El Condado*,⁴ where a claim by the Spanish consul to the possession of a vessel at Glasgow, by virtue of a Spanish decree of requisition, was rejected.

This controversy, however, may now be regarded as settled by *Bank voor Handel en Scheepvaart N.V. v. Slatford*,⁵ where Devlin J. followed the Scots decision in preference to that of Atkinson J.

In that case the Dutch Government, at the time when it was exercising sovereign powers in England with the consent of the British

¹ 13 M.L.R. 73.

² Ibid., at p. 74.

³ This is an unusual application of the doctrine of public policy. "The judge invokes it, not in order to exclude foreign law which would normally be applicable" (see *infra*, p. 150) 'but to allow foreign law to impose itself although it would normally not be applicable'; Wolff, p. 528. See also the observations of Devlin J. in *Bank voor Handel en Scheepvaart N.V. v. Slatford*, [1953] 1 Q.B. 248, at pp. 263-4.

⁴ (1939), L.L.L. Rep. 330.

⁵ [1953] 1 Q.B. 248.

Government, issued a decree which entitled it to assume control of any property belonging to persons resident in Holland.

It was held that the rights thus vested in the Dutch Government were not exercisable in respect of a quantity of gold that had been deposited in London in 1939 by a Dutch bank. In the course of his judgment the learned judge said:

'In short, a principle of private international law that allows property legislation to operate in the territory of another country, so far from being a principle which resolves the conflict of laws, will create a conflict which will require the formulation of a new system to settle. There seems to me to be every reason, if the authorities permit it, for giving effect to the simple rule that generally property in England is subject to English law and to none other.'¹

The financial troubles that beset the world during the inter-war years have obliged most countries to introduce a system of foreign exchange control, under which dealings in the currencies of other countries are severely restricted. In accordance with the principle which denies extra-territorial operation to legislation, it has been held that a transaction will not be affected by such a currency regulation unless it is subject to the law of the country in which the regulation has been issued.² The proper law is decisive in this respect, since it may modify or dissolve the contractual bond.³ Thus in *In re Claim by Helbert Wagg & Co. Ltd.*:⁴

Effect of
foreign
currency
regulations

A loan agreement, to be construed according to German law, was made in 1924 by which an English company agreed to lend to a German company £350,000 with interest at 7½ per cent., the loan to be secured by a mortgage on certain coalfields in Germany. The loan was to be redeemed by January 1945 and payments of principal and interest were to be made in sterling in London.

The borrowers fulfilled their contractual obligations until 1933, when a German moratorium law was passed which required them to make the agreed payments to a Government agency in Berlin in marks instead of in sterling.

At the outbreak of war in 1939, £174,142 was still due under the loan, but the borrowers continued to pay the appropriate amounts in marks to the Government agency and by 1945 had paid the full equivalent in marks of the whole loan, with the result that by the German

¹ Ibid., at p. 260.

² *Rex v. International Trustee*, [1937] A.C. 500; *Kahler v. Midland Bank*, [1950] A.C. 24; *In re Claim by Helbert Wagg & Co. Ltd.*, [1956] Ch. 323.

³ *Kahler v. Midland Bank*, *supra*, at p. 56, per Lord Radcliffe.

⁴ *Supra*.

moratorium law they were discharged from all further liabilities. The question was whether this discharge was effective or whether the lenders could claim to be paid £174,143 in England out of the German assets held by the Administrator of German Enemy Property.

Recognized unless penal or confiscatory Upjohn J. held that the debt was situated in Germany, since that was the only place in which the debtors resided,¹ but he considered that the test to determine whether the moratorium law applied was not the local situation of the debt, but the proper law to which it was subject. Having found this to be German law, he held that according to English private international law the debt was fully discharged by the moratorium law and that no claim was sustainable against the Administrator. The learned judge admitted that a currency regulation of the proper law will not be recognized if it is of a confiscatory or penal nature, but he came to the conclusion that the moratorium law of 1933 was an honest attempt to solve Germany's economic position and in no sense discriminatory against foreign creditors.

The exceptional case of *Kahler v. Midland Bank* This case must be contrasted with the decision of the House of Lords in *Kahler v. Midland Bank*,² where a currency regulation beyond reproach on economic grounds was recognized, although it had been used as an instrument of oppression. The facts were these:

The plaintiff, a Jew, formerly a Czechoslovakian national but at the time of the action a naturalized American, bought on the London Stock Exchange through a Swiss bank certain Canadian bearer shares. His bank at Prague—the Z Bank—deposited the shares with the Midland Bank in London to be held in safe custody for him. In March, 1939, the Germans overran Czechoslovakia and compelled the plaintiff, as the price of being allowed to leave the country, to transfer to the B Bank at Prague, a tool of the Gestapo, the whole of his securities, including the Canadian shares. On April 17th, the Z Bank instructed the Midland Bank to transfer the shares into the depot of the B Bank, on the footing that this transfer was made by the order and for the account of the plaintiff.

To an action of detainee brought by the plaintiff for delivery up of the shares, the Midland Bank contended that it was the bailee of the B Bank and that by a currency regulation of Czechoslovakia it was illegal for the B Bank to part with the shares to a 'currency foreigner', such as the plaintiff, without the consent of the National Bank of Czechoslovakia, which consent had been refused.

The plaintiff's action failed, though it was admitted that he

¹ *Infra*, pp. 456–7.

² [1950] A.C. 24.

was the undisputed owner of the shares. The majority of the House of Lords held in the first place that the proper law of the contract of bailment between the *Z* Bank and the Midland Bank and of the substituted bailment between the *B* Bank and the Midland Bank was the law of Czechoslovakia. Their Lordships then invoked the doctrine that proof of a title to immediate possession is a condition precedent to success in detinue, and held that the plaintiff must necessarily fail, since no such title was vested in him failing the consent of the National Bank. The bailment was not terminable at the will of the plaintiff alone.

This decision has been subjected to damaging criticism,¹ and on the private international law plane it certainly provokes two remarks.

First, it seems a little strange that a bailment to a London bank of chattels, which at all material times had been situated continuously in London and which were re-deliverable in London, should have been regarded as a transaction subject to the law of Czechoslovakia.²

Secondly, Lords Simonds,³ Reid⁴ and Radcliffe⁵ repudiated the suggestion that the Czech currency regulation was of a penal or confiscatory nature. Viewed as a general regulation no doubt this was a correct conclusion,⁶ but the fact remains that it was used as an instrument of confiscation in the particular case of the plaintiff. The agreement by which he recognized the transfer of his shares to the *B* Bank was admittedly signed under duress and was not binding upon him. He was a victim of the German persecution,⁷ but nevertheless in the view of the House of Lords he was precluded by his pleadings from relying upon this argument, since he admitted in his amended statement of claim that he had

¹ Dicey, *op. cit.*, pp. 752-3; F. A. Mann in the following: 11 *M.L.R.* 479; 13 *M.L.R.* 206-12; *The Legal Aspect of Money*, pp. 372-7; 26 *B.Y.B.I.L.* 280.

² Lord Reid and Lord MacDermott disagreed with the majority on this point.

³ At p. 27.

⁴ At p. 47.

⁵ At p. 57.

⁶ As Lord Simonds said in *Zivnostenska Banka National Corp. v. Frankman*, [1950] A.C. 57, 72, to come to a different conclusion is a little difficult in view of the Bretton Woods Agreement Order, 1946, which runs as follows: 'Exchange contracts which involve the currency of any member and which are contrary to the Exchange Control Regulations of that member maintained or imposed consistently with this agreement shall be unenforceable in the territories of any member', S.R. & O. 1946, No. 36, S. 3; 26 *B.Y.B.I.L.* 279.

⁷ *Kahler v. Midland Bank*, [1950] A.C. 24, at p. 30, *per* Lord Normand.

ratified the letter of April 17th written by the Z Bank to the B Bank. As Upjohn J. said in a later case:

'If it had not been for the difficulties which arose on the pleadings in that case, I do not think the House of Lords would have hesitated to investigate the question whether an exchange control statute passed in 1934 with the genuine object of protecting the State's economy had not by 1946 become an instrument of oppression and discrimination.'¹

It may be said, indeed, that the decision in *Kahler's Case* is exceptional and that it is no authority for the view that the currency regulations of the proper law must be blindly and mechanically recognized, irrespective of their nature or of the use to which they have been put. To quote Upjohn J. again:

'This court must be entitled to consider whether, looking at all the circumstances, the law is so far-reaching in its scope and effect as really to offend against consideration of public policy of this country.'²

3. *Where the foreign law is repugnant to the distinctive policy of English law.*³

Public policy relevant to action in England It is a well-established principle that any action brought in this country is subject to the English doctrine of public policy. That this principle is inevitable has been explained by Lord Parker in the following words:

'Whenever the courts of this country are called upon to decide as to the rights and liabilities of the parties to a contract, the effect on such contract of the public policy of this country must necessarily be a relevant consideration. Every legal decision of our courts consists of the application of our own law to the facts of the case as ascertained by appropriate evidence. One of these facts may be the state of some foreign law, but it is not the foreign law but our own law to which effect is given, whether it be by way of judgment for damages, injunction, order declaring rights and liabilities, or otherwise. As has been often said, private international law is really a branch of municipal law, and obviously there can be no branch of municipal law in which the general policy of such law can be properly ignored.'⁴

There is a distinctive policy,⁵ or what Westlake calls a 'stringent domestic policy',⁶ adopted in this country to which the

¹ *In re Claim of Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, 352.

² *Ibid.*

³ On this subject see 39 *Transactions of the Grotius Society*, 39-83 (Prof. Kahn-Freund).

⁴ *Dynamit Actien-Gesellschaft v. Rio Tinto Co. Ltd.*, [1918] A.C. 292, 302.

⁵ Wharton, *Conflict of Laws* (3rd ed.), vol. i, s. 4a.

⁶ Westlake (7th ed.), p. 51.

application of a foreign law must always remain subject. Certain heads of the domestic doctrine of public policy command such respect, and certain foreign laws and institutions seem so repugnant to English notions and ideals, that the English view must prevail in proceedings in this country.

The occasional exclusion of a foreign law on this ground is no doubt inevitable, but the English domestic doctrine of public policy covers a multitude of sins varying in their degree of turpitude, and it is essential to resist the suggestion that an action on a transaction governed by a foreign *lex causae* must necessarily fail because it would have failed had the *lex causae* been English. Judges in the past have now and then expressed somewhat extravagant views on the matter. Thus, for instance, in a restraint of trade case, Fry J. is reported as saying:

‘It appears to me plain that this court will not enforce a contract against the public policy of this country, wherever it may be made. It seems to me almost absurd to suppose that the courts of this country should enforce a contract which they consider to be against public policy simply because it happens to be made somewhere else.’¹

The implication of this is that every limb of the domestic doctrine must apply in every action in England. This can scarcely be so. The conception of public policy is, or should be, narrower and more limited in private international law than in internal law. A transaction that is valid by its foreign *lex causae* should not be nullified on this ground unless its enforcement would offend some moral, social or economic principle so sacrosanct in English eyes as to require its maintenance at all costs and without exception. In the words of Cardozo J. in a New York case:

‘A right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. . . . The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.’²

¹ *Rousillon v. Rousillon* (1880), 14 Ch.D. 351, 369. Actually the governing law in the circumstances of the case was English law. Therefore, of course, the domestic doctrine applied.

² *Loucks v. Standard Oil Co. of New York* (1918), 224 N.Y. 99; Cheatham, pp. 371, 375.

Test for
deciding
whether
English
public
policy
applicable

The particular rule of public policy that the defendant invokes may be of this overriding nature and therefore enforceable in all actions. Or it may be local in the sense that it represents some feature of internal policy. If so it must be confined to cases where the *lex causae* is English.

To ascertain whether it is all-pervading or merely local, it must be examined 'in the light of its history, the purpose of its adoption, the object to be accomplished by it, and the local conditions'.¹ Perhaps the most important question to ask in each case is—what is the rule designed to prevent? Presumably, for instance, the object of the rule which invalidates a promise by a servant not to compete against his master in the future is to enable every person freely to exploit in England the trade that he has learnt. If so, only a rigid doctrinaire would claim that this particular rule is of universal application, designed to control relations between masters and servants in other countries.

Example of
contract in
restraint of
trade

Suppose, for instance, an agreement by a Frenchman, made in France and governed by French law, that after leaving his French employer he will not open a competitive business within 100 kilometres of Calais. Suppose also that the agreement is valid by French law.

If the covenantor opens a business at Boulogne and is sued in England for breach of the agreement, it is unthinkable that he should escape liability by invoking the English prohibition of contracts in restraint of trade. The object of the prohibition can scarcely be to protect the interests of French employees. If, on the other hand, he opens a competitive business in Dover, his right to do so must be recognized, for freedom of trade in England is directly affected.² Similarly, the English attitude towards marriage brocage contracts and towards conditions in restraint of marriage would appear to reflect a merely local policy.

Attitude
of the
courts
exemplified

If the court decides that, having regard to the particular circumstances, the distinctive policy of English law is in truth affected, then the incompatible foreign rule must, indeed, be totally excluded. Some of the older decisions, however, have perhaps tended to invoke the domestic doctrine of public policy in all its ramifications with remorseless determination. Thus in *Grell v. Levy*,³ a London solicitor made an agreement

¹ Wharton, *Conflict of Laws* (3rd ed.), i. 16.

² *Warner Bros. v. Nelson*, [1937] 1 K.B. 209.

³ (1864) 16 C.B. (N.S.) 73.

in France with a Parisian merchant to sue for a debt due to the merchant from an English resident, and it was provided that the honorarium should be one-half of the amount recovered. This agreement, though valid in France, was champertous in the eyes of English law and was held to be illegal. This decision may probably be vindicated on the ground that English law was the *lex causae*, which perhaps was what Erle C.J. meant to indicate when he stressed so forcibly that England was the place of performance.

*Kaufman v. Gerson*¹ is a more striking example of insularity.

The husband of the defendant had misappropriated money entrusted to him by the plaintiff. By a contract made and to be performed in France the defendant agreed to pay to the plaintiff by instalments out of her own money the full amount misappropriated, in consideration that the plaintiff would refrain from prosecuting the husband for what was a crime by French law. Both the plaintiff and defendant were French nationals domiciled in France; the misappropriation had occurred in France; the contract was valid by French law.

This contract could scarcely be regarded as offensive to some fundamental principle of justice, for, as Dicey remarked, there is nothing particularly reprehensible in allowing a person to escape criminal proceedings at the price of paying full compensation to the sufferer.² Nevertheless, an action for the recovery of instalments still due was dismissed on the ground that 'to enforce a contract so procured would be to contravene what by the law of this country is deemed an essential moral interest'.³ In *Addison v. Brown*,⁴ however, the most recent case on the subject, a less insular interpretation was put upon the reservation of public policy.

A wife sued her husband to recover arrears of maintenance due under a contract that was governed by Californian law. It was expressly agreed that neither party would apply to any court for the variation of the contract and that if in fact it were varied by any court in subsequent divorce proceedings it should nevertheless remain in force as written. Ten years later the husband obtained a divorce in California, and the contract, far from being varied, was incorporated in the judgment.

The contract, since it contained an agreement by the parties to

¹ [1904] 1 K.B. 591 (C.A.) reversing Wright J., [1904] 1 K.B. 114. See also *Hope v. Hope* (1857), 8 De G. M. & G. 731 where Turner L.J. went so far as to say that a foreign contract to be enforceable here must 'be consistent with the laws and policy' of England.

² Dicey (5th ed.), pp. 828-30.

³ [1904] 1 K.B. 591, at pp. 599-600, *per* Romer L.J.

⁴ [1954] 1 W.L.R. 779.

oust the jurisdiction of the court, was contrary to the doctrine of public policy as understood in England, and it was therefore pleaded that the action was not maintainable. Streatfeild J., however, refused to treat this particular segment of the doctrine as being of universal application. He said:

‘Although it may be contrary to public policy to oust the jurisdiction of the English courts, I cannot think that it is the public policy of England to oust a plaintiff in the English courts from suing on an agreement, assuming that it is otherwise actionable, on the ground that that agreement purports to oust the jurisdiction of a foreign court.’¹

Summary
of cases
where dis-
tinctive
policy
affected

The problem, therefore, is to classify those cases in which the English court will refuse to enforce a foreign acquired right, on the ground that its enforcement would affront some moral principle the maintenance of which admits of no possible compromise. The following is suggested as the probable classification.

(i) *Where the fundamental conceptions of English justice are disregarded.* The established rule, which will be stated later,² that a foreign judgment cannot be recognized in England if it offends the principles of natural justice, as, for example, if the defendant was denied the opportunity of presenting his case to the foreign court, exemplifies this aspect of English public policy. Another example is the rule that a contract obtained by what the judge regards as coercion is unenforceable in England.³

(ii) *Where the English conceptions of morality are infringed.* It cannot be doubted that a contract or other transaction which is objectionable in English eyes on the ground that it tends to promote sexual immorality⁴ will receive no judicial recognition in England, though it may be innocuous according to its foreign *lex causae*. In an early case Wilmot J. said:

‘In many countries a contract may be maintained by a courtesan for the price of her prostitution; and one may suppose an action to be

¹ [1954.] 1 W.L.R. 784. It is noticeable that the learned judge treated the agreement in question as one designed to oust the jurisdiction of the Californian courts. Its terms, however, expressly provided that there should be no application to *any* court and that a variation made by *any* court should be disregarded. Could an argument have been founded on this all-embracing formula?

² *Infra*, pp. 642 et seqq.

³ *Kaufman v. Gerson*, [1904.] 1 K.B. 591; *supra*, p. 153. Dicey showed convincingly that there was in fact no coercion in that case; Dicey (5th ed.), p. 829.

⁴ See, for example: *Pearce v. Brooks* (1866), L.R. 1, Ex. 213; *Ayerst v. Jenkins* (1873), 16 Eq. 275; *Taylor v. Chester* (1869), L.R. 4 Q.B. 309.

brought here upon such a contract which arose in such a country; but that would never be allowed in this country.¹

(iii) *Where a transaction prejudices the interests of the United Kingdom or its good relations with foreign powers.* An example of the first part of the statement is the prohibition of intercourse with an alien enemy.² In one case, for instance, an English company, owning mines in Spain, made a contract in 1910 for the delivery by instalments spread over a number of years of minerals to a German company.³ The contract contained a suspensory clause which provided that in the event of war the obligations of the parties should be suspended during hostilities. The English company brought an action in 1916 claiming a declaration that the contract was not merely suspended but was abrogated by the existence of a state of war between Great Britain and Germany. The objection was taken that this was a German contract and that therefore it fell to be governed by German law. It was argued that illegality according to English law was irrelevant. What had to be shown was that the contract was illegal by German law. It was held, however, that the German character of the contract had no bearing on the question. 'It is illegal for a British subject to become bound in a manner which sins against the public policy of the King's realm',⁴ and it has long been established that the prohibition of intercourse with an alien enemy rests upon public policy.

Support for the second part of our statement may be derived from the rule that it is contrary to public policy as understood in all civilized nations for persons in England to enter into an engagement with the avowed object of causing injury to a friendly Government,⁵ as, for example, by raising a loan to further a revolt,⁶ to import liquor contrary to a prohibition law,⁷ or to export a prohibited commodity.⁸ Such conduct is a breach of international comity and tends to injure the relations of the British Government with friendly powers.⁹

¹ *Robinson v. Bland* (1760), 2 Burr. 1077, 1084.

² *Robson v. Premier Oil and Pipe Line Co.*, [1915] 2 Ch. 124, 136. *Supra*, pp. 88 *et seqq.*

³ *Dynamit Actien-Gesellschaft v. Rio Tinto Co. Ltd.*, [1918] A.C. 292.

⁴ *Ibid.*, at p. 294, *per* Lord Dunedin.

⁵ *British Nylon Spinners Ltd. v. Imperial Chemical Industries Ltd.*, [1955] Ch. 37, at p. 52.

⁶ *De Wutz v. Hendricks* (1824), 2 Bing. 314.

⁷ *Foster v. Driscoll*, [1929] 1 K.B. 470.

⁸ *Regazzoni v. K. C. Sethia* (1944) *Ltd.*, [1956] 2 All E.R. 487.

⁹ It has been laid down in America that a contract to bribe officers of a foreign

(iv) *Where a foreign law or status offends the English conceptions of human liberty and freedom of action.* The history of the world affords many instances of legal disabilities firmly established in some countries but unknown and even execrated in others. Obvious examples are disqualifications arising from slavery, excommunication, heresy, infamy, civil death, popish recusancy and nonconformity. Happily most of these illustrate the intolerance of a past age, but analogies are not wanting even in the modern world, as is evident from the history of the Nazi régime in Germany. It may be said without hesitation that all disqualifications of this description, which restrict human freedom by penalizing certain classes of the population to the profit of others (what the older jurists called *privilegia odiosa*), have only intra-territorial effect,¹ for, in the eloquent words of Wharton: 'To stretch international law further would be to engraft on free countries the paralysing restrictions of despotisms.'²

It remains to notice a troublesome controversy that may now be relegated with some confidence to a happy oblivion. It concerns the view, sometimes advanced, that a foreign status unknown to English law will not be recognized as such in England, so that, for instance, the relationship arising between the parties to a foreign adoption would have been ignored before the institution was introduced into England in 1927, but would be recognized now.³ This view cannot survive the most perfunctory examination.

In the first place it is wholly incompatible with the fundamental doctrine that a status, once established by the personal law, is of universal application. This doctrine has been elaborated by Scott L.J. in the following well-known passage:

'These elementary reflections lead, as I think inevitably, to the conclusion that universality is the basic principle of status in private

Government, even if not prohibited by the law of the Government, is unenforceable in the courts of the United States; *Oscanyan v. Arms Co.*, 103 U.S. 261, 277, cited in Pollock on Contracts (12th ed.), p. 349, note 77.

¹ *Somerset's Case* (1772), 20 St. Tr. 1; *Forbes v. Cochran* (1824), 2 B. & C. 448, 467, per Best J. (Slavery).

² *Conflict of Laws* (3rd ed.), S. 104.

³ Dicey (5th ed.), Rule 136, p. 509. At p. 510, he said: 'The law of England will not (*semble*) in England allow any status . . . , so long as it is unknown to English law, to have legal effects so far as regards transactions in England.' This view has been abandoned by the editors in the 6th ed., p. 467. In Halsbury, *Laws of England* (3rd ed.), vol. vii, it is said at p. 143: 'The English courts will not, it seems, pay regard to foreign judgments creating a status of a kind not recognized in England.' See also the American Restatement, S. 120.

international law—both in general and in the intendment of English law; that the particular status brought into existence by the law of country *A* must have attributed to it by country *B* the self-same personal capacity or incapacity, and the self-same rights and duties, which country *A* conferred or imposed upon that person, natural or artificial; and that the courts of country *B* can introduce into that status no exceptions or qualifications unknown to the law of its creation, unless they are bound to do so by some definite and positive rule of municipal law, whether statutory or common law, which prohibits them (as in *Birtwhistle v. Vardill*¹) from giving effect to the country *A* status, or commands them to introduce some specific condition or other modification, when asked to apply the consequences which by the law of country *A* would flow from that status in the particular circumstances of the case before them.²

Secondly, the view does not represent and never has represented English private international law. As Westlake pointed out many years ago,³ the title to property of a Scottish *curator bonis*, an official unknown in England, has been admitted in English proceedings.⁴ Legitimation *per subsequens matrimonium* was not introduced into England until 1926, yet for many years before that date the status of persons so legitimated abroad was consistently recognized by the English courts.⁵ Again, polygamy is unknown to domestic English law, but nevertheless the status that it creates in countries where it obtains is far from being disregarded in English proceedings.⁶

It is true, of course, as Scott L.J. indicated in the passage cited above, that the consequences and incidents flowing from a particular status, as fixed by the foreign law under which it has arisen, cannot always be allowed full operation in England. In *Birtwhistle v. Vardill*, for instance, the case mentioned by the learned Lord Justice, the claim of a person, lawfully legitimated according to the Scots law of his domicil, to succeed to a fee simple estate was dis-allowed, since it was an overriding rule that an heir to English land must be *born* to lawful wedlock.⁷ Again, although the status of polygamy is recognized by English private international law, such matrimonial relief as may be incidental to it is not obtainable in England, since the

Status
and its
incidents
dis-
tinguish-
able

¹ (1826) 7 Cl. & F. 895.

² *In re Luck's Settlement Trusts*, [1940] Ch. 864, at p. 894.

³ Private International Law (7th ed.), p. 49.

⁴ *Mackie v. Darling* (1871), L.R. 12 Eq. 319.

⁵ *Infra*, p. 404.

⁶ *Infra*, p. 296.

⁷ *Infra*, p. 415.

jurisdiction of the High Court in this regard is attuned to a different form of marriage.¹

Two decisions on the French status of prodigality The two authorities invoked by those who would disregard a status unknown to English law are *Worms v. De Valdor*² and *In re Selor's Trusts*,³ both of which were concerned with the French status of prodigality. By French law, an adviser, *conseil judiciaire*, may be appointed to safeguard the interests of an adult person of extravagant habits. The judgment by which this is done may prohibit the prodigal from compromising claims, borrowing, receiving money, alienating or mortgaging property and bringing or defending actions without the collaboration of his adviser.⁴

In *Worms v. De Valdor*, however, a prodigal was allowed to succeed in an action, brought in his own name and without the collaboration required by French law, for the delivery up of a bill of exchange, on the ground that the identity of the person entitled to sue is a matter of procedure to be determined by the *lex fori*. In the case of *In re Selor's Trusts*, a prodigal successfully recovered a sum of money, again without the collaboration of his adviser, since Farwell J. reached the strange conclusion that the disability imposed by French law was of a penal nature.⁵ Neither decision, therefore, is authority for the wider proposition that a status unknown to English law must be ostracized.

¹ On the distinction between status and its incidents see Graveson in 26 *Journal of Comparative Legislation and International Law* (November 1944), Pt. III, p. 27.

² (1880), 49 L.J. (Ch.) 261.

³ [1902] 1 Ch. 488.

⁴ It is sometimes said that partial incapacities of these kinds should not be classified as a status and that therefore they are not caught by the doctrine of universality. This argument was demolished by Westlake, *op. cit.*, pp. 48-49. 'But what is status except the sum of the particulars in which a person's condition differs from that of the normal person?'; *ibid.*, p. 49.

⁵ The incapacity of suing, far from penalizing the prodigal, is imposed upon him for his own benefit and protection.

CHAPTER VII

DOMICIL

I. The definition of domicile *Pages 150-65*

as he is legitimate or illegitimate,¹ and the *domicil of choice* which every person of full age is free to acquire in substitution for that which he at present possesses.

Meaning
of 'domicil'

Despite the warning of Sir George Jessel that an absolute definition is impossible,² it is nevertheless essential to ascertain what English law understands by domicile. Since the most important matters that fall within its province relate to the family, it would seem almost axiomatic that the crucial factor in determining its location should be the place where a man's home is established.

'By domicile', said Lord Cranworth in 1858, 'we mean home, the permanent home, and if you do not understand your permanent home I'm afraid that no illustrations drawn from foreign writers will very much help you to it.'³

Former
English
doctrine of
equivalence
of domicile
and home

Indeed, it may be said that the earlier English judges were content to equate domicile with home in the sense in which the man in the street, untroubled by legal subtleties, would understand that word. Just under a hundred years ago, Kindersley V.C. propounded a definition that for facile comprehension and application it would be difficult to better.

'That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home.'⁴

This short statement stresses the familiar features of a man's permanent home, if that term is used in its popular sense. It must be the result of a voluntary choice, it must not be transient, and the mere fact that the *propositus* is prepared to move to a different country on some future contingency, such as his succession to a family estate, does not render it impermanent. His conjectures as to what he will do if this or that happens are ruled out as irrelevant.

Domicil no
longer
equivalent
to home in
popular
sense

Unfortunately, however, more recent decisions, while repeating that a permanent home constitutes domicile, have insisted that the word 'permanent' must be given its literal

¹ *Infra*, p. 183. ² *Doucerv. Geoghegan* (1878), L.R. 9 Ch.D. 441, 456.

³ *Whicker v. Hume* (1858), 7 H.L.C. 124, 160.

⁴ *Lord v. Colvin* (1859), 4 Drew, 366, 376. Cp. Phillimore's definition, *Commentaries on Private International Law or Comity*, iv. 43: 'a residence at a particular place, accompanied with positive or presumptive proof of continuing it for an unlimited time'.

meaning. A present intention to remain indefinitely in an existing home does not *per se* satisfy the test of permanence. What must be shown is an intention never to leave. Accordingly, it has several times been affirmed, and more than once by the House of Lords, that the present home of a man is not to be equated with domicile if he contemplates some event, however remote or uncertain, which may cause him at some indeterminate time in the future to change his country of residence. If this possibility is present to his mind, even an intention to reside indefinitely in a place is ineffective.¹ Thus Lord Cranworth, despite his earlier rebuff to those incapable of understanding their permanent home,² relented five years later and offered his own solution of the riddle.

'The present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there, without looking forward to any event, certain or uncertain, which might induce him to change his residence. If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this even a present intention of making it a permanent home. It is rather a present intention of making it a temporary home, though for a period indefinite and contingent.'³

This uncompromising attitude is well illustrated by two decisions of the House of Lords, *Winans v. A.-G.*⁴ and *Ramsay v. Liverpool Royal Infirmary*.⁵ The facts of the former case were these:

Winans was born in 1823 in the United States, where he was con- *Winans v.*
tinuously engaged in his father's business until 1850. From 1850 to *A.-G.*

¹ *Moorhouse v. Lord* (1863), 10 H.L.C. 272, 285-6; *Jopp v. Wood* (1865), 4 De G. J. & S. 616; *Goulder v. Goulder*, [1892] P. 240; *Winans v. A.-G.*, [1904] A.C. 287; *A.-G. v. Yule* (1931), 145 L.T. 9; *Wahl v. A.-G.* (1932), 147 L.T. 382; *Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 588. The rigorous theory adopted in these decisions has been applied in South Africa, see Pollak in 50 *South Africa Law Journal*, 465 et seqq., and *Johnson v. Johnson* (1931), A.D. 391; *O'Mant v. O'Mant* (1947), S.A.L.R. 26, where it was held that a husband's residence in Rhodesia, where he had established his home after leaving South Africa, could not constitute domicile, because, in the words of the trial judge, 'always at the back of his mind he seems to have had the intention that if [his wife] did follow him he would be prepared to leave any country to which he had gone'.

² *Supra*, p. 160.

³ *Moorhouse v. Lord* (1863), 10 H.L.C. 272, 285-6. Contrast Lord Thurlow's view: 'A British man settles as a merchant abroad; he enjoys the privileges of the place; he may mean to return when he has made his fortune; but if he dies in the interval will it be maintained that he had his domicile at home?': *Bruce v. Bruce* (1790), 2 Bos. & Pul. 229, note.

⁴ [1904] A.C. 287.

⁵ [1930] A.C. 588.

1859 he went to Russia, where he was employed by the Government in equipping railways and in the construction of gunboats to be used against England during the Crimean War. He married a British subject and appears never to have set foot again in the U.S.A. In 1859 he showed signs of consumption, and, being advised by the doctors to winter in Brighton in England, he reluctantly took rooms at a hotel there, and in 1860 took upon lease two adjoining houses which he connected structurally. He still held these houses at the time of his death. From 1860 to 1870 his practice was to spend four months of the winter at this Brighton residence and the remainder of the year in Russia. From 1870 to 1883 the routine was altered, for he spent more than half of each year in England or Scotland, the rest of the time being divided between Russia and Germany. In 1883 he ceased to visit Russia, and for the next ten years divided his time between Germany, England and Scotland. From 1893 until he died in 1897 he lived entirely in England.

The question was whether at the time of his death Winans still retained his domicil of origin or whether he had acquired a domicil of choice in England. The fact that he had resided principally in England for the last thirty-seven years of his life raised a very strong presumption in favour of an English domicil, but there was no direct evidence as to what his intention was, and, as Lord Macnaghten observed, it is necessary in these cosmopolitan days to look very narrowly into the nature of residence before depriving a man of his native domicil. To reach a satisfactory decision in the present case, therefore, there was no alternative but 'to consider what manner of man Mr. Winans was, what were the main objects of his existence, and what sort of a life he lived in this country'. Lord Macnaghten accordingly analysed with some particularity the hopes, projects and daily habits of Mr. Winans. He found that, in addition to the care of his health, Mr. Winans had two objects in life. The first was the construction in Baltimore of a large fleet of spindle-shaped vessels, which, being proof against pitching and rolling, would restore to America the carrying trade of the world and give to her such superiority at sea that she would have nothing to fear from a naval war with Great Britain. The second object was to develop a large property of about 200 acres in Baltimore. On this, wharves and docks were to be constructed for the spindle-shaped vessels, and a large house built in which Mr. Winans intended to live in order that he might take personal command of the whole undertaking. He succeeded in getting control of the property only at the very end of his life, and at the time of his death he was working day and night on the scheme.

Thus, of these two schemes, one was anti-British, the other wholly American. It was true that Mr. Winans had lived in England for thirty-seven years and that he had not even visited America since his departure in 1850, but this quiescence could be explained by his failure to get control of the Baltimore property. Moreover, he led a secluded life, mixed little with English people, and devoted the whole of his time to his health and to the advancement of his schemes. In the result, therefore, Lord Macnaghten held that the domicil of origin in New Jersey had not been lost. He said:

'On the whole I am unable to come to the conclusion that Mr. Winans ever formed a fixed and settled purpose of abandoning his American domicil and settling finally in England. I think up to the very last he had an expectation or hope of returning to America and seeing his grand schemes inaugurated.'¹

*Ramsay v. Liverpool Royal Infirmary*² concerned one George Ramsay v. Liverpool Royal Infirmary Bowie, who had left a will that was valid if his domicil at death was Scottish but invalid if it was English. The story of his life was uneventful.

He was born in Glasgow in 1845 and therefore with a Scottish domicil of origin. He gave up his employment as commercial traveller at the age of thirty-seven and refused to do any more work during the remaining forty-five years of his life. But even the idle must be fed, and after residing with his mother and sisters in Glasgow, he moved his residence to Liverpool in 1892 in order to live on the bounty of his brother. At first he lived in lodgings, but moved to his brother's house when the latter died twenty-one years later, and resided there with his sole surviving sister until she died in 1920. He remained there until his own death in 1927.

Thus George lived in England for the last thirty-six years of his life. During that time he left the country only twice, once on a short visit to the U.S.A., on the second occasion to take a holiday in the Isle of Man. Though he often said he was proud to be a Glasgow man, he resolutely refused on several occasions to return to Scotland, even for the purpose of attending his mother's funeral. On the contrary, he had expressed his determination never to set foot in Glasgow again and had arranged for his own burial in Liverpool.

Thus evidence was completely lacking of any inclination, either by words or actions, to disturb a long and practically uninterrupted residence in England. Nevertheless the House

¹ Lord Halsbury agreed, Lord Lindley dissented. ² [1930] A.C. 588.

of Lords held unanimously that George died domiciled in Scotland. Their Lordships denied that his prolonged residence disclosed an intention to choose England as his permanent home. Rather, they inferred that had his English source of supply failed he would have retreated to Glasgow.

Modern
meaning of
permanent
home This particular decision may, of course, be explained as resting upon its own peculiar facts and therefore as exceptional, but the truth none the less is that during the last century the English courts in the present context have succeeded in giving a strained and unnatural meaning to the word 'permanent'. In that space of time the test of intention has been altered fundamentally and for the worse. A hundred years ago an intention to reside indefinitely in a place was regarded as an intention to reside there permanently, *notwithstanding that* it was contingent upon an uncertain event. Nowadays, an intention of indefinite residence is not equivalent to an intention of permanent residence, *if* it is contingent upon an uncertain event. Thus the English conception of domicile corresponds neither with what the ordinary man understands by his permanent home nor with the Continental criterion of habitual residence. This change of attitude lays the law open to criticism in several respects.

Artificiality
of English
conception One defect, due to the wide field over which the investigation of the court extends, is that the settlement of a disputed question of domicile becomes an unnecessarily complex matter. It is comparatively simple to identify a man's permanent home in the popular sense of the term, but once the relevance of vague hopes or dim expectations of a return to the fatherland is admitted there is no end to the detail that the judge must consider. Often he must review the whole history of a man's life and examine such elusive factors as his fears and aspirations; his hopes, hates and prejudices; his declarations, both written and spoken.¹ It follows that in many cases a practitioner will experience great difficulty in advising his client upon his place of domicile until it has been judicially determined, for the puzzle will be to predict what weight would be given by a judge to the various factors upon which the question turns. There is no common standard, since a fact which appeals to one mind as being of decisive significance, seems of trivial importance to another. The desire of Mr. Winans to return to America in order to construct anti-British ships impressed Lord Macnaghten, but was discarded by Lord Lindley as immaterial.

¹ *Infra*, pp. 170 et seqq.

The result is that a man's domicile may remain uncertain throughout his life.

The weight of authority, therefore, supports the following view expressed by Lord Chelmsford in *Moorhouse v. Lord*¹ and already cited.

'The present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there, without looking forward to any event, certain or uncertain, which might induce him to change his residence.'

Judges, however, conscious that a literal application of this astigmatic doctrine must frequently run counter to the needs of justice and common sense, especially when it is realized that domicile is the governing factor in a variety of different situations, have occasionally shown a welcome readiness to interpret a man's intention in a manner rather less strict.² The explanation, no doubt, of this divergence of practice from strict doctrine was given by Cook.³ He maintained that 'domicil' should be regarded as a relative term and that what he called the 'single conception' theory, i.e. the theory that domicile has exactly the same meaning for each of the separate situations in which it is relevant, was doomed to failure in practice.⁴ A judge, he said, must inevitably focus his attention upon the concrete problem before him, otherwise he will neglect the 'social and economic' requirements of the situation.

Disadvantage of the single conception theory

'The meaning given to the symbol "domicil" has varied with the nature of the problem presented: taxation, divorce, intestate succession, &c. In short, what was being decided in any particular case presented for decision was: do the facts of this case show a connexion of this person with the State in question of such a character as to make it reasonable to do the particular thing asked?'⁵

The path of reform, however, is unlikely to take this direction in England.⁶

¹ (1863), 10 H.L.C. 272, 285-6.

² Among modern decisions see, for example: *Zanelli v. Zanelli* (1948), 64 T.L.R. 556; *Donaldson v. Donaldson* (1949), 65 T.L.R. 233; *Re Lockie* (1950), 44 R. & I. T. 30; *Travers v. Holley*, [1953] P. 246.

³ *Logical and Legal Bases of Conflict of Laws*, pp. 194 et seqq. See also *The American Law Institute Proceedings* (1925), iii. 226-31.

⁴ 'Too broadly generalized conceptions are a constant source of fallacy': *Lorenzo v. Wirth* (1898), 170 Mass. 596, per Holmes J., cited Cook, op. cit., p. 194.

⁵ Op. cit., p. 196.

⁶ The Private International Law Committee was requested to consider 'what amendments are desirable in the law relating to domicile, in view especially of the decisions in *Winans v. A.-G.* and *Ramsay v. Liverpool Royal Infirmary*'. In its

2. *General rules.*

Rules of
general
application

1. Every
person
must have
a domicile

There are five general rules that may be briefly discussed. It is a settled principle that nobody shall be without a domicile, and in order to make this effective the law assigns what is called a domicile of origin to every person at his birth, namely, to a legitimate child the domicile of the father, to an illegitimate child the domicile of the mother,¹ and to a foundling the place where he is found.² This prevails until a new domicile has been acquired,³ so that if a person leaves the country of his origin with an undoubted intention of never returning to it again, nevertheless his domicile of origin adheres to him until he actually settles with the requisite intention in some other country.⁴

2. A per-
son cannot
have two
simulta-
neous
domicils

Residence
differs from
domicil

A person cannot have two domicils. Since the object of the law in insisting that no person shall be without a domicile is to establish a definite legal system by which certain of his rights and obligations may be governed, and since the facts and events of his life frequently impinge upon several countries, it is necessary on practical grounds to hold that he cannot possess more than one domicile at the same time. Confusion is sometimes caused by the use of the words 'domicil' and 'residence' as if they were synonymous.⁵ This is not true. A person, indeed, may reside in more countries than one, and there are several matters with regard to which such multiple residence may produce legal results.

Thus the mere residence in England of a domiciled foreigner is sufficient to subject him to the jurisdiction of the English court, a Report (Cmd. 9068), the committee, while retaining the traditional definition—'the domicile of a person shall be in the country in which he has his home and intends to live permanently' (Art. 2 (1))—has recommended the introduction of the three following rules, of which the first is the most important, designed to facilitate the inference of domicile from residence.

Rule 1: Where a person has his home in a country, he shall be presumed to intend to live there permanently.

Rule 2: Where a person has more than one home, he shall be presumed to intend to live permanently in the country in which he has his principal home.

Rule 3: Where a person is stationed in a country for the principal purpose of carrying on a business, profession or occupation and his wife and children (if any) have their home in another country, he shall be presumed to attend to live permanently in the latter country.

¹ *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, 457.

² Dicey, p. 88; Westlake, s. 248; Wharton (3rd ed.), s. 39; Savigny, Guthrie's translation, pp. 87–88.

³ *Munro v. Munro* (1840), 7 Cl. & F. 842, at p. 876.

⁴ *Infra*, pp. 180 et seqq.

⁵ Dicey, p. 85.

fact which has led to the unfortunate expression forensic domicil; and again a foreigner who is resident in the country may become statutorily liable to the payment of income tax.¹

But mere residence does not constitute domicil. In addition to residence in a country domicil requires a present intention on the part of the resident to make that country his sole and permanent home.

Domicil denotes the relation between a person and a particular territorial unit possessing its own system of law. It may well be that in a unit such as India different legal rules apply to different classes of the population according to their religion, race or caste, but none the less it is the territorial law of India that governs each person domiciled there, notwithstanding that Hindu law may apply to one case, Mohammedan to another. This was also true of certain Oriental countries such as Egypt, where under the old system of capitulations Englishmen formed separate privileged communities immune from the local jurisdiction and subject in matters of personal status to English law. For a time, however, the judges followed a false trail. They said that an Englishman, though permanently resident in Egypt, did not acquire an Egyptian domicil if he was a member of a privileged community, since the courts and the law to which he was subject were not those of the territorial sovereign in whose dominions he resided. To acquire an Egyptian domicil it was said that he must not merely live in a community separate and apart but must merge in the general life of the native inhabitants.² This fallacy was finally exposed in *Casdagli v. Casdagli*,³ when the House of Lords demonstrated that the law applicable to Englishmen in Egypt was in the true sense of the word the territorial law of Egypt, since it was the law which the sovereign of the domicil allowed to be applied to certain persons domiciled in his territory.

3. Domicil denotes connexion with a territorial system of law

'The *lex domicilii* for these English residents is the general law of Egypt applicable to native Egyptians modified by the provisions of the capitulations and the statute dealing with the Mixed Tribunals.'⁴

There is a presumption in favour of the continuance of an existing domicil. Therefore the burden of proving a change

4. Burden of proof

¹ *Cooper v. Cadwallader* (1904), 5 Tax. Cas. 101.

² *Casdagli v. Casdagli*, [1918] P. 89, 99.

³ [1919] A.C. 145, overruling opinion of Chitty J. in *In re Tootal's Trusts* (1883), 23 Ch.D. 532, and dictum of Lord Watson in *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431, 445.

⁴ *Casdagli v. Casdagli*, [1919] A.C. 145, 193, *per* Lord Atkinson.

lies in all cases upon those who allege that a change has occurred.¹ This presumption may have a decisive effect, for if the evidence is so conflicting or indeterminate that it is impossible to elicit with certainty what the resident's intention is, the court will decide in favour of the existing domicile.²

3. *The acquisition of a domicile of choice.*³

The elements of residence and intention
The two requisites for the acquisition of a fresh domicile are residence and intention. It must be proved that the person in question established his residence in a certain country with the intention of remaining there permanently. These two elements of *factum et animus* must concur, but this is not to say that there need be unity of time in their concurrence. The intention may either precede or succeed the establishment of the residence.⁴ The emigrant forms his intention before he leaves England for Australia, the *émigré* who flees from persecution may not form it until years later.

Residence Since residence and intention must concur they should logically be examined separately, but it will be found that in practice it is difficult, if not impossible, to keep them in watertight compartments. It is not residence *per se*, but residence accompanied by a certain intention, that constitutes domicile, and since *au fond* the requirement of residence is satisfied by mere presence the crucial inquiry in a contested issue centres upon the mind of the *de cujus*. Strictly speaking, residence is a fact, though a necessary one, from which intention may be inferred.⁵

Residence is *prima facie* evidence of domicile This much is clear, however, that a person's residence in a country is *prima facie* evidence that he is domiciled there.⁶ There is a presumption in favour of domicile which grows in strength with the length of the residence. Indeed, a residence may be so long and so continuous that, despite declarations of a contrary intention,⁷ it will raise a presumption that is rebut-

¹ *Munro v. Munro* (1840), 7 Cl. & F. 842, 891; *Hodgson v. De Beauchesne* (1858), 12 Moo. P.C. 285, 323; *Winans v. A.-G.*, [1904] A.C. 287, 289; *In re Lloyd Evans*, [1947] Ch. 695.

² See, for example, *Winans v. A.-G.*, *supra*, Lord Halsbury's speech.

³ The question of capacity to acquire a fresh domicile is discussed *infra*, p. 188.

⁴ Wolff, p. 114.

⁵ *Munro v. Munro* (1840), 7 Cl. & F. at p. 877.

⁶ *Bruce v. Bruce* (1790), 2 B. & P. 229, 231; *Bempde v. Johnstone* (1796), 3 Ves. Jun. 198, 201. Especially when he dies there, *President of United States v. Drummond* (1864), 33 Beav. 449.

⁷ *Stanley v. Bernes* (1830), 3 Hagg. Ecc. 373; *In re Marrett, Chalmers v. Wingfield* (1887), 36 Ch.D. 400.

table only by actual removal to a new place.¹ A man cannot gainsay the natural consequences of permanent residence in a country by, for example, declaring in his will that he does not intend to relinquish his former domicile in another country.²

On the other hand, time is not the sole criterion of domicile.³ Length of residence alone is not decisive
Long residence does not constitute nor does brief residence negative domicile. Everything depends upon the attendant circumstances, for they alone disclose the nature of the person's presence in a country. In short, the residence must answer 'a qualitative as well as a quantitative test'.⁴ Thus in *Jopp v. Wood*,⁵ where it was held that a residence of twenty-five years in India did not suffice to give a certain John Smith an Indian domicile because of his alleged intention ultimately to return to Scotland, the land of his birth, Turner L.J. commented as follows upon the length of his residence:

'But nothing is better settled with reference to the law of domicile than that the domicile can be changed only *animo et facto*, and although residence may be decisive as to the *factum*, it cannot, when looked at with reference to the *animus*, be regarded otherwise than as an equivocal act. The mere fact of a man residing in a place different from that in which he has been before domiciled, even although his residence there may be long and continuous, does not of necessity show that he has elected that place as his permanent and abiding home. He may have taken up and continued his residence there for some special purpose, or he may have elected to make the place his temporary home. But domicile, although in some of the cases spoken of as "home", imports an abiding and permanent home, and not a mere temporary one.'⁶

Conversely, brevity of residence is no obstacle to the acquisition of a domicile if the necessary intention exists. If a man clearly intends to live in another country permanently, as, for example, where an emigrant, having wound up his affairs in the country of his origin, sets sail with his wife and family for Australia, his mere arrival there will satisfy the element of residence.⁷ A brief residence may suffice

¹ *Hodgson v. De Beauchesne* (1858), 12 Moo. P.C. 285, at p. 329, *per* Dr. Lushington; *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, 455.

² *Re Liddell-Grainger's Will Trusts*, *Dormer v. Liddell-Grainger*, [1936] 3 All E.R. 173.

³ *Hodgson v. De Beauchesne* (1858), 12 Moo. P.C. at pp. 329-30.

⁴ *Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 588, 598, *per* Lord Macmillan.

⁵ (1865), 4 De G. J. & S. 616.

⁶ A more modern case in which a long-continued residence was held not to constitute domicile was *A.-G. v. Yule* (1931), 145 L.T. 9.

⁷ *Hodgson v. De Beauchesne* (1858), 12 Moo. P.C. 286, 330; *Bell v. Kennedy*

A striking example of this truth occurred in America:¹

A man abandoned his home in State *X* and took his family to a house in State *Y*, about half a mile from *X*, intending to live there permanently. Having deposited his belongings there, he and his family returned to *X*, in order to spend the night with a relative. He fell ill and died there. It was held that his domicile at death was in *Y*.

It remains now to consider the element of intention.

Nature of
intention

It is not necessary to discuss further the nature of the intention essential for the acquisition of a new domicile. It will suffice to recall that, at any rate in theory, the intention must be one of permanent residence and that this quality is deemed by the law to be absent if the resident contemplates some event, whether certain or uncertain, the occurrence of which will cause him to move his home elsewhere.²

Time at
which in-
tention is
relevant

The traditional statement that there must be a *present* intention of permanent residence merely means that so far as the mind of the *de cujus* at the relevant time was concerned he possessed the requisite intention. The relevant time varies with the nature of the inquiry. It may be past or present. If, for example, the inquiry relates to the domicile of a deceased person, it must be ascertained whether at some period in his life he had formed and retained a fixed and settled intention of residence in a given country. Once this is established, evidence of his subsequent fluctuations of opinion as to whether his choice was wise will be ignored.³ If, on the other hand, the essential validity of a proposed marriage depends upon the law of *X*'s domicile and if the identity of this law is in doubt, what must be examined is his immediate intention.

Nature of
evidence
from which
intention is
gathered

It is impossible to lay down any positive rule with respect to the evidence necessary to prove intention. All that can be said is that every conceivable event and incident in a man's life is a relevant and an admissible indication of his state of mind. It may be necessary to examine the history of his life with the most scrupulous care, and to resort even to hearsay evidence where the question concerns the domicile that a person, now deceased, possessed in his lifetime.⁴ Nothing must be over-

(1868), L.R. 1 Sc. & Div. 307, 319; 'It may be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile'; *per* Lord Chelmsford.

¹ *White v. Tennant* (1888), 31 West Virginia 790; Lorenzen, p. 13.

² *Supra*, pp. 160 et seqq.

³ *In re Marrett, Chalmers v. Wingfield* (1887), 36 Ch.D. 400.

⁴ *Scappaticci v. A.-G.*, [1955] P. 47.

looked that might possibly show the place which he regarded as his permanent home at the relevant time.¹ No fact is too trifling to merit consideration.

'There is no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change the domicile. A trivial act might possibly be of more weight with regard to determining this question than an act which was of more importance to a man in his lifetime.'²

In fact, one of the defects of English law is that the evidence adduced in a disputed case of domicile is often both voluminous and difficult to assess. This is the price to be paid for two somewhat irrational features of the English doctrine.

Concentration on a man's actual state of mind

The first is the over-scrupulous manner in which the courts attempt to discover a man's exact intention. The tendency is to investigate his actual state of mind, rather than to rest content with the natural inference of his long-continued residence in a given country. This, indeed, is to set sail on an uncharted sea. As Lord Colonsay said in a leading case:

'There is perhaps no chapter in the law that has from such extensive discussion received less of satisfactory settlement. That is no doubt attributable to the nature of the subject, including, as it does, inquiry into the *animus* of persons who have either died without leaving any clear record of their intentions, but allowing them to be collected by inference from acts often equivocal; or who, being alive and interested, have a natural tendency to give their bygone feelings a tone and colour suggested by their present inclinations.'³

The second irrational feature is the requirement that for residence in a country to be equated with domicile it must be intended to be permanent. If the mere contemplation by a man of a possible return to his fatherland at some indeterminate time in the future is enough to deprive his present home of the quality of permanence, then of necessity a number of elusive and dubious matters will be admissible in evidence and the stage will be set for a protracted and complicated trial. Nothing must be neglected that can possibly indicate the bent of the resident's mind. His aspirations, whims, *amours*, prejudices, health, religion, financial expectations—all are taken into

¹ See, for example, the voluminous evidence considered by Chitty J. in *Craignish v. Craignish*, [1892] 3 Ch. 180.

² *Casdagli v. Casdagli*, [1918] P. 89, 99, *per* Swinfen Eady L.J.

³ *Bell v. Kennedy* (1868), L.R. 1 Sc. & Div. 307, at p. 322.

account. As Lord Atkinson observed with respect to *Winans v. A.-G.*,¹ 'the tastes, habits, conduct, actions, ambitions, health, hopes, and projects of Mr. Winans deceased, were all considered as keys to his intention to make a home in England'.² Again, in *Hoskins v. Matthews*,³ we find Turner L.J. saying:

'We have to consider, then, whether Mr. Matthews afterwards abandoned his English domicile and acquired a new domicile in Tuscany, and for this purpose we must examine his movements, his acts, his motives, his family, his fortune and his health, for all these considerations enter into or may enter into the question of his domicile.'

Examples
of relevant
evidence

Having regard, therefore, to the roving commission imposed upon the courts, it is not surprising that their decisions exhibit a multiplicity of different factors which have been regarded as *indicia* of intention. Without attempting to give an exhaustive list, it may be useful to observe that at one time and another the following have been regarded as criteria of intention: naturalization,⁴ purchase of a house⁵ or of a burial ground,⁶ the exercise of political rights,⁷ the establishment of children in business,⁸ the statutory declaration made by a candidate for naturalization that he intends to reside permanently in the United Kingdom,⁹ the place where a man's wife and family reside,¹⁰ departure from a country owing to compulsion of war,¹¹ the refusal of a foreign *fiancée* to leave her own country,¹² statements as to his domiciliary intentions made by a deceased person in his lifetime.¹³ The relative value of many of these considerations was discussed by the House of Lords in *Wahl v. A.-G.*¹⁴

¹ [1904] A.C. 287; *supra*, p. 161.

² *Casdagli v. Casdagli*, [1919] A.C. 145, 178.

³ (1856), 8 De G. M. & G. 13, 16; *infra*, p. 177.

⁴ *D'Etchegoyen v. D'Etchegoyen* (1888), 13 P.D. 132.

⁵ *D'Etchegoyen v. D'Etchegoyen*, *supra*; *Moorhouse v. Lord* (1863), 10 H.L.C. 272; *Stevenson v. Masson* (1873), L.R. 17 Eq. 78; *Craignish v. Craignish*, [1892] 3 Ch. 180.

⁶ *Stevenson v. Masson*, *supra*; *Haldane v. Eckford* (1869), L.R. 8 Eq. 631.

⁷ *Drevon v. Drevon* (1864), 34 L.J. (N.S.) Ch. 129, 137.

⁸ *Stevenson v. Masson* (1873), L.R. 17 Eq. 78.

⁹ *Gulbenkian v. Gulbenkian*, [1937] 4 All E.R. 618; distinguish *Wahl v. A.-G.* (1932), 147 L.T. 382.

¹⁰ *Forbes v. Forbes* (1854), Kay 341; *Aitchison v. Dixon* (1870), L.R. 10 Eq. 589.

¹¹ *In re Lloyd Evans*, [1947] Ch. 695.

¹² *Donaldson v. Donaldson*, [1949] P. 363.

¹³ *Scappaticci v. A.-G.*, [1955] P. 47.

¹⁴ (1932), 147 L.T. 382.

Undue stress must not be laid upon any single fact, however impressive it may appear when viewed out of its context, for its importance as a determining factor may well be minimized when considered in the light of other qualifying events. Again, no one fact is of constant value, for every case varies in its circumstances, and what is of decisive importance in one may be of little weight in another.¹

No one fact necessarily decisive

It is for this reason that it is impossible to formulate a rule specifying the weight to be given to particular evidence. All that can be gathered from the authorities in this respect is that very little reliance can be placed upon declarations of intention, especially if they are oral. The common law rule, that expressions of intention by a living person cannot be received in evidence unless against his own interest, is not necessarily applicable to an issue of domicile,² and it is common enough for witnesses to testify to parole declarations made during his life by the person whose domicile is in question. Nevertheless, this kind of evidence, especially when given long after the conversation occurred, is suspect. In the words of Dr. Lushington:

Declarations of intention are of little weight

‘To entitle such declarations to any weight, the court must be satisfied not only of the veracity of the witnesses who depose to such declarations, but of the accuracy of their memory, and that the declarations contain a real expression of the intention of the deceased.’³

The requirement that declarations should contain ‘a real expression of intention’ deserves emphasis, for it only too frequently happens that they cannot be taken at their face value. They may be interested statements designed to flatter or to deceive the hearer; they may represent nothing more than vain expectations unlikely to be fulfilled; and the very facility with which they can be made requires their sincerity to be manifested by some active step taken in furtherance of the expressed intention.⁴

‘Declarations as to intention’, said Lord Buckmaster, ‘are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the person to whom, the purposes

¹ *Hodgson v. De Beauchesne* (1858), 12 Moo. P.C. 285, 330; *Doucet v. Geoghegan* (1878), 9 Ch.D. 441, 445; *Wahl v. A.-G.* (1932), 147 L.T. 382.

² *Bryce v. Bryce*, [1933] P. 83.

³ *Hodgson v. De Beauchesne* (1858), 12 Moo. P.C. 285, 325; *In re Liddell-Grainger's Will Trusts*, [1936] 3 All E.R. 173.

⁴ ‘The courts naturally are disposed to give less weight to that sort of declaration than to the acts of the testator’, *Drevon v. Drevon* (1864), 34 L.J. (N.S.) Ch. 129, 131, *per* Kindersley V.-C.

for which and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expression.¹

Evidence of past intention Even lower in the scale of values is evidence given in the course of the trial by the *de cuius* himself, not of his past declarations, but of his past intention. This must be accepted with very considerable reserve, for on such a personal issue as his own place of domicile he is under a bias that is likely to influence his mind, perhaps even his veracity.²

Motive and intention It is a commonplace that to constitute domicile a residence must be voluntary—a matter of free choice.³ This, though accurate, is a little misleading, since there are many cases where the election of a new country will suffice for the acquisition of a domicile, though in one sense the elector is far from being a free agent. Thus, if a foreigner, pursued by the secret police of his own country, flees to England and finally settles there, most people would not regard his choice of a new home as voluntary. The only motive that dictated his change of residence was the desire to escape persecution. The question, therefore, is—what is the significance of motive in determining whether there has been a change of domicile? Must it be said, for instance, that a man's residence in a country is not voluntary and therefore not sufficient to constitute domicile if it originated in inexorable necessity? This certainly does not represent the law.

Motive relevant, not decisive Motive is merely one of the sources of intention and it therefore cannot be decisive in an issue of domicile. Once it is proved that a residence is intended to be permanent, the reason that induced the intention is immaterial. A man may have been driven to England by the pressure of political oppression, but that fact in itself does not preclude his intention to settle in the country for good. On the other hand, motive, though in civil matters generally disregarded by English law, is undoubtedly relevant to the inquiry whether the intention requisite for domicile exists.

Meaning of 'voluntary' residence It is one of the many elements to be considered. In short, most of the facts that are said to deprive a man of freedom of choice so as to render his residence involuntary are really only

¹ *Ross v. Ross*, [1930] A.C. 1, 6. In several cases even written declarations have been disregarded: *In re Martin*, [1900] P. 211 (declaration in mortgage deed); *In re Liddell-Grainger's Trusts*, [1936] 3 All E.R. 173 (declaration in a will); *Wahl v. A.-G.* (1932), 147 L.T. 382 (declaration in naturalization papers).

² *Bell v. Kennedy* (1868), L.R. 1 Sc. & Div. 307, 313; *Craignish v. Craignish*, [1892] 3 Ch. 180, 190.

³ Dicey, pp. 92 et seqq.

indicia, though no doubt strong *indicia*, of his intention. They must be taken into account and given due weight, but by themselves they can seldom be conclusive. The choice of a new domicile must assuredly be voluntary, but what this means is that there must have been *sufficient* freedom for the formation of intention.

There are several cases in which the circumstances may raise a doubt whether the *de cujus* had possessed sufficient freedom of choice.

Examples
where
residence
may not be
voluntary:
(i) Prison-
ers

A clear example of constraint preclusive of this freedom is imprisonment in a foreign country, and there is no doubt that a prisoner, except perhaps one transported for life, retains the domicile that he possessed before his confinement.¹

It cannot be predicated that refugees, such as the *émigrés* who fled from France after the revolution or from Hitler's Germany, necessarily retain their former domicile. The motive that induced the flight no doubt militates against the inference that there was an intention of permanent residence in the chosen asylum. There is a presumption against a change of domicile, but this may well be reversed by subsequent circumstances, and in particular by the continued retention of the residence after a return to the original country has become safe and practicable.²

(ii) Refu-
gees

Another example of involuntary residence in a new country is that of the fugitive from justice. Nevertheless, if a man leaves his domicile in order to escape the consequences of a crime, the natural inference is that he has left it for ever and that a presumption arises in favour of the acquisition of a fresh domicile in the country of refuge. His departure has, indeed, been forced upon him, yet it is scarcely credible that he intends it to be temporary. In one case, however, Lindley L.J. suggested that the 'all-important' factor is whether there is a definite period after which a wrongdoer may return home in safety. In other words, if the crime ceases to be punishable or the sentence to be enforceable after a given number of years, residence in another country, unless fortified by other facts, does not effect a change of domicile; but if the fugitive remains perpetually liable to proceedings, then the new place of residence becomes the new domicile.³ This view was not adopted

(iii) Fugi-
tives from
justice

¹ *Burton v. Fisher* (1828), Milw. 183; *Butler v. Dolben* (1756), 2 Lee 312, 318; *In re the late Emperor Napoleon Bonaparte* (1853), 2 Rob. Eccl. 606.

² *De Bonneval v. De Bonneval* (1838), 1 Curt. 856; *May v. May*, [1943] 2 All E.R. 146.

³ *In re Martin, Loustalan v. Loustalan*, [1900] P. 211, 232.

by the other members of the court, Rigby L.J. remarking that to suggest that the fugitive in question intended at the time of his escape from France to return as soon as he could safely do so (twenty years in the particular case) was 'so irrational that, in default of the strongest evidence, it ought not to be imputed to him'.¹ It is, indeed, difficult to agree with Lindley L.J. except possibly where the offence is trifling and the term of prescription short.

(iv) Fugitive debtors Freedom of choice is also affected when a man finds it desirable to flee the country to avoid his creditors. Whether this raises a presumption against an intention to return to his own country must obviously depend upon a variety of circumstances, such as the amount of the debts, the possibility of meeting them, the imminence of legal proceedings, the activities of the debtor in his new residence and so on. It certainly cannot be said that the adoption of the new residence *per se* effects a change of domicile.²

(v) Invalids The case of an invalid who settles in a foreign country for the sake of his health, not merely for the purpose of convalescence, should on principle occasion no difficulty. The principle is that unless a man is a free agent his adoption of a new residence does not effect a change of domicile. He must have an alternative—either to stay or to go. But it would seem that an alternative is open to every invalid. To take even the extreme case, if a man, being assured by his doctors that he has but a few months to live, decides to spend the short remainder of his life in a country where the climate may alleviate his suffering, it would seem clear, if all sentiment of pity is dismissed, that of his own volition he has chosen a new and permanent home, since he intends to continue his new residence until death. The *factum et animus* essential for a change of domicile are present.³ Yet, this suggestion has been stigmatized by Lord Kenyon as 'revolting to common sense and the common feelings of humanity'.⁴ No doubt it is, and no doubt a court would in fact declare against a change of domicile in such circumstances, but nevertheless the decision would be difficult to reconcile with strict principle unless, perhaps, it could be buttressed by

¹ *In re Martin, Loustalan v. Loustalan*, [1900] P. 211, at p. 235.

² For example, see *Pitt v. Pitt* (1864), 4 Macq. 627; *Briggs v. Briggs* (1880), 5 P.D. 163; *In re Robertson* (1885), 2 T.L.R. 178; *In re Wright's Trusts* (1856), 25 L.J. Ch. 621, 624.

³ But see Dicey, p. 122.

⁴ *Moorhouse v. Lord* (1863), 10 H.L.C. 272, 292; see also *Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42, 139, *per* Lord Campbell.

the argument that the invalid contemplated a return to his former home if the medical verdict should prove to be unfounded.

The case just put, however, is an extreme one. Where the necessity of selecting a different climate is of a less compelling nature, where there is no immediate danger,¹ the normal principle is consistently applied and the fact that the invalid's sole reason for departure is a desire to enjoy better health or to retard the progress of a disease cannot *per se* be regarded as excluding an intention to remain permanently in the chosen place. Otherwise a most artificial meaning would be attached to intention. We should be forced to hold, for example, that an Englishman who settles in France in order to escape income-tax retains his English domicile, since he will probably return if the cost of living falls. The exact point arose in *Hoskins v. Matthews*.²

In that case a testator with an English domicile of origin went to Florence at the age of 60, and, except for three or four months in each year, lived in a villa which he had bought there until he died twelve years later. He was suffering from an injury of the spine and there is no doubt that he left England solely because he thought the warmer climate of Italy might benefit his health or might even cure him. His housekeeper deposed as follows:

'Mr. M.'s object in coming to Florence and residing there was to benefit his health; he had no other object in staying there. He frequently regretted having purchased the villa. He often said there was no country like one's own to live in. He was speaking of England when he so expressed himself. His wish was to return to England if his state of health would allow him to do so, and I think he would have done so had he been restored to health. . . . He never treated Florence as being his permanent place of residence.'

It was contended, therefore, that since the residence in Florence was a matter of necessity, not of choice, it did not suffice to cause a change of domicile. In the result it was held³ that the English domicile had been lost. Turner L.J. said:

'In this case I find nothing in the evidence to show that Mr. Matthews, when he left England, was in any immediate danger or apprehension. He was, no doubt, out of health, and he went abroad for the purpose of trying the effect of other remedies and other climates. That he would have preferred settling in England I have little doubt, but I think he was not driven to settle in Italy by any cogent necessity.

¹ *Hoskins v. Matthews* (1856), 8 De G. M. & G. 13, 28.

² (1856), 8 De G. M. & G. 13.

³ Knight Bruce L.J. dissenting.

I think that in settling there *he was exercising a preference, and not acting upon a necessity*, and I cannot venture to hold that in such a case the domicile cannot be changed.¹

(vi) Miscellaneous cases There are various other cases, somewhat analogous to those just discussed, in which the reason to which a change of residence is due has a rather more decisive effect upon the question of intention. Thus, if a person resides abroad in pursuance of his duties as a public servant of his own Government, as, for example, an ambassador, a military or naval officer, a colonial judge or a consul, or if he is a servant under contract to go where sent, the inference to be drawn from the cause of the residence is that it is not intended to be permanent.¹

In such cases the existing domicile is retained unless there are additional circumstances from which a contrary intention can be collected.² Thus, to take an extreme case, it has been held that even a member of the armed forces may acquire a domicile in a foreign country where he is compulsorily resident and whence he is liable to be removed at any moment by higher authority, if there is sufficient evidence of his intention to settle there permanently as soon as he once more becomes a free agent.³ The fact that the area of his new home coincides with his area of service does not *per se* preclude him from acquiring a new domicile.

It would seem that a person who enters the armed forces of a foreign power, in such circumstances as to necessitate his indefinite residence in the foreign country, acquires a new domicile there.⁴

¹ *In re Patten* (1860), 6 Jur. (N.S.) 151 (naval); *A.-G. v. Rowe* (1862), 1 H. & C. 31 (Chief Justice of Ceylon); *Firebrace v. Firebrace* (1878), 4 P.D. 63 (army officer); *In re Mitchell, ex parte Cunningham* (1884), 13 Q.B.D. 418 (army officer); *In re Macreight. Paxton v. Macreight* (1885), 30 Ch.D. 165 (Jersey men serving in British Army); *A.-G. v. Kent* (1862), 31 L.J. Ex. 391, 397 (attaché to Portuguese Embassy); *Sharpe v. Crispin* (1869), L.R. 1 P. & D. 611 (consul). In the South African case of *Baker v. Baker*, [1945] A.D. 708, approval was expressed of the view taken by the Court of Session in *Sellars v. Sellars*, [1942] S.C. 206, that a sailor or soldier is not precluded from acquiring a new domicile in a foreign country where he is serving, and from which he is liable to be moved under orders.

² *In the goods of James Smith* (1850), 2 Rob. Eccl. 332.

³ *Donaldson v. Donaldson*, [1949] P. 363. So held also in Scotland, *Sellars v. Sellars*, [1942] S.C. 206; and in South Africa, *Baker v. Baker*, [1945] A.D. 708; *Nicol v. Nicol*, [1948] 2 S.A.L.R. 613; *Ex parte Glass*, [1948] 4 S.A.L.R. 379.

⁴ *In re Mitchell, ex parte Cunningham* (1884), 13 Q.B.D. 418, 421, as qualified by the earlier remarks of Page Wood V.-C. in *Forbes v. Forbes* (1854), Kay 341, 356.

The burden of proof that lies upon those who allege a change of domicil varies with the circumstances. In this connexion there are two observations that may be made.

First, English judges have taken the view that it requires far stronger evidence to establish the abandonment of a domicil of origin in favour of a fresh domicil than to establish a change from one domicil of choice to another.¹

Secondly, and by way of contrast, there is authority for the view that a change of domicil from one country to another under the same sovereign, as from Jersey or Scotland to England, is more easily proved than a change to a foreign country.² It is not lightly to be inferred that a man intends to settle permanently in a country where he will possess the status of an alien, with all the difficulties and conflict of duties that such a status involves.

It is important to appreciate, however, that nationality and domicil are two different conceptions and that a man may change the latter without divesting himself of his nationality.³ There is no rule that he must intend *quatenus in illo exuere patriam*, despite a short flirtation with the suggestion by certain of the earlier judges.⁴

‘A change of domicil is not a condition of naturalization, and naturalization does not necessarily involve a change of domicil.’⁵

An Englishman may remain an Englishman in the sense that his allegiance renders him subject to certain duties to the Crown, and yet he may so change his residence that many of his legal rights and obligations will be determinable by a foreign system of law, as being the law of his domicil.⁶ The mere fact that an alien living in England under a certificate of registration is liable to deportation for misbehaviour or has even been recommended for deportation does not prevent him from acquiring an

¹ *Infra*, p. 180.

² *Whicker v. Hume* (1858), 7 H.L.C. 124, 159, *per* Lord Cranworth; approved by Lord Chelmsford, *Moorhouse v. Lord* (1863), 10 H.L.C. 272, 287.

³ *Boldrini v. Boldrini*, [1932] P. 9, 15; *Bradfield v. Swanton*, (1931) Ir.R. 446. For the converse case of a change of nationality without a change of domicil, *Wahl v. A.-G.* (1932), 147 L.T. 382.

⁴ Pollock C.B. in *A.-G. v. Wahlstatt* (1864), 3 H. & C. 374, 387; Lords Cranworth and Kingsdown in *Moorhouse v. Lord* (1863), 10 H.L.C. 272. See the discussion by Westlake, *Private International Law* (4th ed.), pp. 328–35.

⁵ *Wahl v. A.-G.* (1932), 147 L.T. 382, *per* Lord Atkin.

⁶ *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, 452.

English domicil of choice,¹ or deprive him of a domicil already acquired.² Neither the permissive nor the precarious character of his residence nullifies his intention to settle in England.³

4. *Domicil of origin and domicil of choice contrasted.*

Abnormal features of domicil of origin As compared with the views held on the Continent and in the United States of America, the domicil of origin is regarded by English law as fundamentally different from a domicil of choice. It differs in its character, in the conditions necessary for its abandonment and in its capacity for revival.

Its tenacity In the first place, there is the strongest possible presumption in favour of its continuance. As contrasted with a domicil of choice, it has been said by Lord Macnaghten that 'its character is more enduring, its hold stronger and less easily shaken off'.⁴ In fact, decisions such as *Winans v. A.-G.*⁵ and *Ramsay v. Liverpool Royal Infirmary*⁶ warrant the conclusion that almost overwhelming evidence is required to shake it off. In the latter of these cases evidence was completely lacking of the slightest indication, either by words or actions, that George Bowie intended to live anywhere else than in England. Yet it was held that the tenacity of his Scottish domicil of origin had not yielded. These cases do not stand alone.⁷

Domicil of choice lost by removal *animo non revertendi* The second difference relates to the abandonment of an existing domicil. Since a domicil of choice is voluntarily acquired *animo et facto*, so it is extinguishable in the same manner, i.e. merely by a removal from the country *animo non revertendi* and even without acquiring a fresh domicil.⁸ The only distinction between acquisition and abandonment is that the latter requires less evidence than the former.⁹

Domicil of origin not lost by removal *animo non revertendi* But the domicil of origin, which in its inception is not a matter of free will but is communicated to a person by operation of law, is not extinguished by mere removal *animo non revertendi*.

¹ *Boldrini v. Boldrini*, [1932] P. 9; *May v. May* (1943), 169 L.T. 42; *Zanelli v. Zanelli* (1948), 64 T.L.R. 556.

² *Cruh v. Cruh*, [1945] 1 All E.R. 545.

³ *Zanelli v. Zanelli*, *supra*, per Lord du Parcq.

⁴ *Winans v. A.-G.*, [1904] A.C. 287, 290.

⁵ *Supra*, p. 161.

⁶ [1930] A.C. 588; *supra*, p. 163.

⁷ See, for example, Bentwich, *Le Développement récent du domicile en droit anglais* (Extrait du *Recueil des Cours*, 1934), pp. 13 et seqq., who cites *Fowler v. Fowler*, *The Times* newspaper, 21 Nov. 1930; *Wahl v. A.-G.*, (1932), 147 L.T. 382; *A.-G. v. Yule* (1931), 145 L.T. 9.

⁸ *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, 450.

⁹ *In re Lloyd Evans*, [1947] 1 Ch. 695.

It cannot be lost by mere abandonment. It endures until supplanted by a fresh domicil of choice. *Bell v. Kennedy*¹ is the leading authority for this rule.

The domicil of origin of Bell was in Jamaica, where he had been born of Scottish parents domiciled in that island. He was educated in Scotland but returned to Jamaica after reaching his majority. Some fourteen years later he left the island without any intention of returning, resided with his mother-in-law in Scotland, and occupied himself in looking for an estate in that country on which to settle down. He had not been successful in this when his wife died in 1838, but after her death he bought an estate and it was admitted that at the time of the trial he had acquired a Scottish domicil. The question for decision, however, was—what was his domicil at the time of his wife's death?

It was held that his domicil at that moment was in Jamaica. Although he had abandoned the island for good in 1838 and was resident in Scotland, he had not at that time decided to make his permanent residence there. The evidence showed that in 1838 his mind was vacillating with regard to his future home. Therefore, since he had not acquired a Scottish domicil of choice, he retained his domicil of origin.

The third difference, which is the complement of the second, lies in the doctrine of revival. If the domicil of origin is displaced as a result of the acquisition of a domicil of choice, the rule of English law is that it is merely placed in abeyance for the time being. It remains in the background ever ready to revive and to fasten upon the *propositus* immediately he abandons his domicil of choice.² The position may be illustrated by an example, based on the hypothesis that the George Bowie, whose case was decided in *Ramsay v. Liverpool Royal Infirmary*,³ had married after his arrival in England and that a son, X, had been born to him. In these circumstances X's domicil of origin would have been Scottish, since at his birth his father was domiciled in Scotland. Let us now suppose the following:

Domicil of origin revives if domicil of choice abandoned

At the age of 22, X, who has developed a strong dislike for the United Kingdom, leaves the country determined never to set foot in the British Isles again. He acquires a domicil of choice in Peru. After residing there for forty years, in the course of which he has amassed a fortune, he leaves the country for good and takes up his temporary residence in New York, being undecided whether to settle permanently in Virginia or California.

¹ (1868) L.R. 1 Sc. & Div. 307.

² *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441.

³ *Supra*, p. 163.

The result is that immediately upon his departure from Peru his Peruvian domicil ceases abruptly, but his Scots domicil of origin revives and remains attached to him until he has in fact acquired a domicil of choice in some other country. It is clear, of course, that during his period of indecision in New York there must be some personal law applicable to him. This might be either Peruvian or Scottish law. In the United States of America, where the doctrine of revival is not accepted, it would be the law of Peru. According to Lord Chancellor Hatherley, however, to admit this is to be driven to the absurdity of asserting a person to be domiciled in a country which he has resolutely forsaken and cast off, simply because he may (perhaps for years) be deliberating before he settles himself elsewhere.¹ He then asks:

‘Why should not the domicil of origin cast upon him by no choice of his own, and changed for a time, be the State to which he naturally falls back when his first choice has been abandoned *animo et facto*, and whilst he is deliberating before he makes a second choice?’

Eccentric
results of
doctrine of
revival

Yet certain doubts suggest themselves. Is it so absurd to prefer the law under which the man has recently been living, perhaps for a prolonged period? Are the claims of the law which is imposed upon him at birth, independently of his volition, superior to that which he has voluntarily chosen and long retained? And what if it is his domicil of origin that he has ‘resolutely shaken and cast off’? At any rate the advantages of preferring the domicil of origin in the case of our hypothetical X are not particularly conspicuous.

The country which determines his personal law is one which he has never visited and for which he feels a repugnance. Nevertheless, if he desires a divorce, he must resort to Scotland. If, during his residence in New York, he legitimates a child by a method recognized in Peru or New York but not in Scotland, he will have achieved nothing. If he dies intestate leaving movables in England, they will be distributed according to Scots law and United Kingdom death duties will be payable.

These illustrations, which could be multiplied, provoke the thought that the virtues of the doctrine of revival are not so obvious as appeared to the mid-Victorian judges.²

¹ *Udny v. Udny* (1869), *supra*, at p. 450.

² The Committee on Private International Law has recommended the abolition of the doctrine of revival. It proposes the following enactment: ‘A domicil, whether of origin or of choice, shall continue until another domicil is acquired’; Cmd. 9068.

There can be no doubt, then, that the English conception of the domicile of origin is exceptional and widely different from that current on the Continent and in the United States of America. It has been said that it represents 'the coherence of the English family in the upper strata of society and of the lasting sentimental and frequently material connexion of the family members to their common place of origin'.¹ This may be true, since the doctrine became firmly established in the middle of the nineteenth century when England was a nation of enterprising pioneers, most of whom regarded their ultimate return home as a foregone conclusion. But, whether true or not, it is evident that the English doctrine is more akin to nationality than to domicile in the Continental sense.² In fact it transcends even nationality in stability and permanence, for though it may be placed in abeyance it can never be destroyed. To the end of his life a man's domicile of origin retains its capacity for revival. On the other hand, nationality is easily destructible.³

Domicil of origin more stable even than nationality

5. *Domicil of dependent persons.*

There are three classes of dependent persons—infants, married women and lunatics.

A child acquires at birth a domicile of origin by operation of law, namely, if legitimate and born in his father's lifetime, the domicile of his father;⁴ if illegitimate⁵ or born after his father's death,⁶ the domicile of his mother. A foundling is domiciled in the country where he is found.⁷ If a child is born illegitimate, but is later legitimated, his father's domicile will be communicated to him from the date of legitimation, but it is probable that his domicile of origin remains that of his mother, presuming that at his birth his parents were domiciled in different countries.⁸

Infant's domicile of origin

¹ Nussbaum, *Principles of Private International Law*, p. 135.

² Rabel, *The Conflict of Laws*, i. 110.

³ Bentwich, *Le Développement récent du principe du domicile en droit anglais* (Extrait du *Recueil des Cours*, 1945), p. 9.

⁴ *Forbes v. Forbes* (1854), Kay 341, 353; *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, 457.

⁵ *Udny v. Udny*, *supra*; *In re Wright's Trusts* (1856), 2 K. & J. 595; *Urquhart v. Butterfield* (1887), 37 Ch.D. 357.

⁶ There appears to be no English authority for this.

⁷ Dicey, p. 88; Westlake, s. 248; Wharton (3rd ed.), s. 39; Savigny, Guthrie's translation, pp. 37-38.

⁸ Dicey, p. 89; Wolff, p. 118.

Domicil of infant cannot be changed by his own act Before reaching full age an infant is utterly incapable of acquiring by his own act an independent domicil of choice.¹ He is powerless to alter his civil status. If, for instance, an Englishman marries at nineteen, sails with his wife for Australia, buys a farm and acts generally in such a way as to show an undoubted intention to reside there permanently, he none the less retains his English domicil until he attains his majority. Such a rule is completely out of touch with the realities of life, especially when the age of majority is as high as twenty-one, but one comforting thought is that though the rule is a commonplace of judicial dicta there is no English case in which the capacity of a male infant to acquire a fresh domicil has called for a decision. It is admitted, of course, that the domicil of a female infant becomes that of her husband upon her marriage to a domiciled foreigner, for otherwise there would be no common matrimonial law. In Scotland and in the U.S.A.² it is held that the marriage of a male infant carries with it the power of acquiring a domicil of choice, on the ground presumably that his rights and obligations as a husband prevail over those formerly applicable to him *qua* son.³

Effect of change in parent's domicil The position is, then, that the domicil of origin remains constant throughout life and that an infant is unable to acquire a domicil of choice by his own act. This inability, however, is confined to him, and there is nothing to prevent the acquisition of a domicil of choice *for* him by the act of one of his parents. This may be effected by the father or after his death by the mother.

Domicil of infant necessarily follows that of father The primary rule is that the domicil of an infant automatically changes with any change that occurs in the domicil of the father.⁴ As between a living father and his infant children there is a necessary unity of domicil. This unity is not destructible at the will of the father. It is not terminated if he purports to create a separate domicil for his son, for instance, by entrusting his future care and maintenance to a relative domiciled in another country or by setting him up in business abroad.⁵ This doctrine, that a change in the father's domicil is necessarily communicated to the child, is generally laid down in absolute

¹ *Forbes v. Forbes* (1854), Kay 341, 353.

² Beale, p. 214; Goodrich, p. 87.

³ For the Continent see Rabel, i. 173-4.

⁴ *D'Etchegoyen v. D'Etchegoyen* (1888), 13 P.D. 132. As to whether a change in a guardian's domicil is communicated to his ward see 5 *I. & C.L.Q.R.* 196 et seqq.

⁵ Wolff, p. 117; Goodrich, p. 84.

terms, but it is to be hoped that should the occasion arise it will not be pressed to its logical conclusion.

Suppose, for instance, that a father deserts his son, leaves him in his domicil of origin and himself acquires a fresh domicil elsewhere. Or suppose that he is divorced for adultery and the custody of the children is given to his wife.

In such cases as these it is scarcely credible that a court would affirm the inevitability of a common domicil.¹

One undecided point is whether a later domicil acquired by the father after the infant's birth and still possessed by him at the termination of the infancy constitutes the domicil of origin.² For instance:

Is domicil of origin affected by father's change of domicil?

A father, domiciled in England at the time of his son's birth, acquires a domicil of choice in France and retains it until after his son comes of age.

What is the son's domicil of origin as distinct from any domicil of choice that he may acquire after reaching full age? The English doctrine of revival may make this a matter of considerable importance. Thus, if after reaching his majority he acquires a domicil of choice in, say, Italy, and then abandons that country for good and dies without having established his permanent home elsewhere, the domicil of origin that revives and governs the testamentary or intestate succession to his movables will be either English or French, according to whether it was at the date of his birth or at the date of his majority that his original status was settled.³

Certainty is all-important in matter of status, and on this ground the preferable solution, supported by certain dicta,⁴ is that the decisive date should be the birth of the child.

An infant acquires, upon the death of his father, the domicil of his mother.⁵ The question that has arisen here is whether such an infant's domicil continues to follow that of the mother, or whether there are any circumstances in which it will remain

Effect of father's death during minority of child

¹ In the U.S.A. the domicil of an abandoned child does not follow that of the deserting parent, Goodrich, p. 85; and the domicil of the mother is communicated to the infant children if their custody is given to her, Beale, i. 215; Wolff, p. 117. The Private International Law Committee suggests that the courts should have power to make such provision for varying the domicil of an infant as they may deem appropriate to his welfare; Cmd. 9068.

² 16 B.Y.B.I.L. 87.

³ Wolff, s. 116 (E).

⁴ *Firebrace v. Firebrace* (1878), 4 P.D. 63, 66; *In re Macreight. Paxton v. Macreight* (1885), 30 Ch.D. 165, 168.

⁵ *Pottinger v. Wightman* (1817), 3 Mer. 67.

unaffected by her act. The general doctrine, which would appear to be strengthened by the Guardianship of Infants Act, 1925, is that if after the death of the father the infant continues to live with the mother, then any new domicile acquired by the mother is *prima facie* to be regarded as communicated to the infant.¹ It does not follow, however, that a change in the mother's domicile *necessarily* affects the infant.² It has been said that the infant's domicile is unaffected if the change is due to some fraudulent design on the part of the mother,³ as, for example, where her motive is to take advantage of a law of succession more beneficial to herself. Apart, however, from such a case as this, the true view would seem to be that the power possessed by a widow of changing her children's domicile is vested in her solely for the welfare of the children. The presumption that the children follow her domicile is rebutted if it can be shown that the result is disadvantageous to them, and this rebuttal will more readily operate when the change in the mother's domicile is due to her remarriage.⁴

Wife takes
and retains
during
marriage
domicil of
husband

The domicile of a husband is communicated to his wife immediately upon the solemnization of the marriage and, according to English law, it is necessarily and inevitably retained by her for the duration of the coverture.⁵ Upon the death of her husband she continues to retain it until she leaves the country *animo non revertendi* and either reverts to her domicile of origin or acquires a domicile of choice.⁶ She possesses no capacity whatsoever during the marriage of acquiring a separate domicile of her own, not even if she is judicially separated,⁷ or if her husband has deserted her and established a home with another woman in a different country,⁸ or if he has committed acts which afford ground for divorce.⁹ This incapacity, which has disappeared in the United States of America and

¹ *Johnstone v. Beattie* (1843), 10 Cl. and F. 42, 138.

² *In re Beaumont*, [1893] 3 Ch. 490. The Private International Law Committee has recommended that a change of domicile by a parent shall not affect an infant's domicile unless the parent so intends; Cmd. 9068.

³ *Pottinger v. Wightman*, *supra*, per Sir William Grant.

⁴ *In re Beaumont*, [1893] 3 Ch. 490. As to whether the domicile of an infant without living parents can be changed see 5 *I. & C.L.Q.R.* 196 et seqq. (Erwin Spiro).

⁵ *Harvey v. Farnie* (1882), 8 App. Cas. 43; *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574.

⁶ *Re Wallach*, [1950] 1 All E.R. 199.

⁷ *A.-G. for Alberta v. Cook*, [1926] A.C. 444 (P.C.).

⁸ *H. v. H.*, [1928] P. 206; *Herd v. Herd*, [1936] P. 205.

⁹ *Lord Advocate v. Jaffrey*, [1921] 1 A.C. 146.

in several Continental States, represents the last surviving relic in English law of the married woman's subjection to her husband.¹

The prerequisite of the unity of domicile is marriage. A marriage may be valid, voidable or void. A voidable marriage is one which may be judicially annulled at the instance of either party on some ground, such as impotence, recognized by law. Until annulment, however, it is regarded as a subsisting valid marriage. On the other hand, a marriage which is void by reason *inter alia* of the near relationship of the parties or their failure to observe the legal formalities at the ceremony requires no decree of annulment. It is regarded as never having existed.² One result of this distinction is that, if a woman goes through a ceremony of marriage with a man domiciled in a different country, she automatically acquires his domicile if the marriage is valid or voidable, but not if it is void.³

The marriage must be valid or voidable

Although there is no direct authority, it is generally argued that the domicile of a lunatic cannot be changed either by himself or by the person to whose care he has been entrusted.⁴ Of course, in accordance with the general principle applicable to infants, the domicile of the father will be communicated to a child of unsound mind during the minority of the latter, but a somewhat irrational distinction has been suggested as regards an adult lunatic. If he has been continuously insane both during and after infancy, it is said that his domicile will continue to change with that of his father; but that if he first becomes insane after reaching his majority, his then domicile becomes indelible, for if the power of changing it were vested in the father or committee great danger might be done to 'the interests of others'.⁵ The correct solution, though not yet supported by authority in England, seems clear enough. The

Lunatics

¹ The Private International Law Committee has recommended that a married woman who has been separated from her husband by the order of a court of competent jurisdiction should be treated as a single woman; Cmd. 9068. The Royal Commission on Marriage and Divorce has recommended that for the purpose of establishing the jurisdiction of the English court in divorce and nullity of marriage she shall be entitled to claim a separate English domicile if she is *living separate and apart from her husband*; Cmd. 9678, paras. 825, 894.

² For void and voidable marriages see *infra*, pp. 338 et seqq.

³ *De Reneville v. De Reneville*, [1948] P. 100.

⁴ *Urquhart v. Butterfield* (1887), 37 Ch.D. 357, 382; *Bempde v. Johnstone* (1796), 3 Ves. Jun. 198; *Sharpe v. Crispin* (1869), L.R. 1 P. & M. 611; Dicey, pp. 119-20; Westlake, s. 251.

⁵ *Sharpe v. Crispin* (1869), L.R. 1 P. & M. 611, 618, per Sir J. P. Wilde.

paramount consideration is the interest of the lunatic, not of others. Therefore, subject to the approval of the court, his committee should be entitled to change his domicile if this appears to be for his benefit.¹

Capacity
to acquire
domicil

The question as to what law governs the capacity of a dependent person to acquire a fresh domicile has been raised in only one English case where, however, it did not require an answer.² It has been closely examined by Professor Graveson.³ The point may be illustrated by two hypothetical examples.

If a husband domiciled in New York deserts his wife and goes abroad with another woman, is his wife capable of acquiring a separate domicile in England, in which country she is now residing *animo manendi*? She possesses the capacity by the law of New York, but not by English law.⁴

If the court refers this matter to the law of New York, it will infringe the English doctrine of unity of domicile between husband and wife; if it prefers English law as being either the *lex fori* or the law of the intended domicile, it will impose upon the wife a domicile in New York that is denied to her by the law of that State. A second hypothesis is this:

A man, domiciled in England, twenty years of age and therefore of full capacity by Swiss law, establishes his permanent residence in Switzerland. Is he to be denied a Swiss domicile on the ground that he is *incapax* by his English *lex domicilii*? Or, to take the reverse case, if the same man is domiciled in Switzerland, is he capable of acquiring an English domicile?

It is reasonably clear that if a question of this nature were to arise the court would choose the law either of the existing or of the intended domicile. Arguments can be advanced in favour of either solution.⁵ If a single rule covering all cases is to be laid down, the law of the existing domicile would appear to be preferable, but it is submitted that this is one of those questions where any broad generalization is undesirable. The choice of law rule should be designed to fit each type of case. What is appropriate, for instance, for the deserted married woman, is not necessarily appropriate for the infant.

¹ This has now been recommended by the Private International Law Committee; Cmd. 9068.

² *Urquhart v. Butterfield* (1887), 37 Ch.D. 357, see *per* Lopes L.J., at p. 384.

³ 3 *I.L.Q.R.*, pp. 149-63.

⁴ *Cp. ibid.*, p. 154.

⁵ *Ibid.*, pp. 156-60.

6. *Domicil and nationality.*

Nationality is a possible alternative to domicil as the criterion of the personal law.¹ These are two different conceptions. Nationality represents a man's political status, by virtue of which he owes allegiance to some particular country; domicil indicates his civil status and it provides the law by which his personal rights and obligations are determined.² Nationality depends, apart from naturalization, on the place of birth or on parentage; domicil, as we have seen, is constituted by residence in a particular country *animo manendi*. It follows that a man may be a national of one country but domiciled in another.

Domicil
and nation-
ality dis-
tinguished

The history of the parts played by these two concepts in the present context is shortly as follows.

As we have already seen, the problem of a conflict of laws in its modern form did not arise until the emergence of the medieval city States in Italy. The growth of inter-city commerce compelled the post-glossators to establish the identity of the personal law, and they had no hesitation in affirming that its criterion was domicil. For over five hundred years this principle had no rival. Nationality was not considered as a possible alternative. One reason was that for several centuries the problem of the choice of law did not usually arise between the subjects of different countries, but between the inhabitants of the various parts of one country. France, for instance, was organized into a number of provinces each of which to a large extent enjoyed its own individual system of law. The same came to be true of the Netherlands and Germany and ultimately of North America. In such circumstances it is obvious that, since the inhabitants of these political States all owed allegiance to the same sovereign, a question of conflict of laws arising between them could not be referred to the law of their nationality. It is not surprising, therefore, that the *lex domicilii* won universal recognition.

Domicil
prevailed
after fall
of Roman
Empire

A decisive break with tradition, however, occurred with the promulgation of the Code Napoléon in 1803. This provided that the rules contained therein concerning status and capacity should govern Frenchmen even though residing in foreign countries,³ and, although no provision was made for the reverse case of foreigners residing in France, the prevailing tendency

Law of
nationality
adopted in
France,
1803, and
in Austria,
1812

¹ In certain countries, such as India, China, Algeria, Tunisia, Syria and Egypt, the personal law depends upon religion or race; Rabel, i. 124-5.

² *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, 457, *per* Lord Westbury.

³ Art. 3 (3).

Mancini's
influence
in favour
of nation-
ality

in the French courts has always been to apply by way of reciprocity the national law of a foreigner to any matter concerning his status or capacity. The Austrian code followed suit in 1812 by providing that the capacity of an Austrian should be governed by Austrian law irrespective of his domicile or residence. Later the reception of nationality as the test of the personal law was greatly influenced by events in Italy. The man chiefly responsible for this was the Italian patriot Mancini. At a famous lecture delivered at the University of Turin in 1851, he vigorously emphasized the significance of nationality. Laws, he said, are made more for an ascertained population than for an ascertained territory. The one concern of a sovereign is his subjects, and in framing his legislation he considers their physical and moral qualities, their habits and requirements, indeed even the climate, temperature and fertility of the soil of the country to which they belong. Thus, for instance, French legislation provides the ideal law for a Frenchman, since it is most suited to his character, and therefore logic requires that it should continue to govern him no matter where he may go or where he may become domiciled. Exceptionally, however, the national law must be discarded if its application will conflict with the public policy of the forum. Mancini exercised great influence over legislation when Italy, by throwing off the Austrian yoke, established herself as a separate kingdom, and it was mainly due to him that the Italian code of 1866 ordained that the status, capacity and family relations of persons should be governed by the law of the nation to which they belonged.

Wide-
spread
adoption
of principle
of nation-
ality

The truth is that the ascertainment of the personal law, which should be governed by legal and practical considerations, has been influenced by varying political and economic factors. The French revolution, the struggles of Italy to win independence, the wave of nationalism that swept Europe in the nineteenth century, the desire of the poorer countries to share in the prosperity of their emigrants—these and other similar circumstances have led to a widespread idolatry of the principle of nationality. At present many of the most important countries, such as France, Germany, Italy, Spain, Sweden, Holland, Greece, Japan and Mexico, comprising probably about 500 million people,¹ adopt nationality as the criterion of

¹ In 1909 it was estimated by Zeballos that about 500 million persons were subject to their *lex domicilii* and about 460 million to their *lex patriae*; Wolff, s. 97; Nussbaum, p. 24.

the personal law. On the other hand the British Commonwealth, the United States of America, Norway, Denmark and Brazil, among others, still stand by the test of domicile.¹

It may be asked, what are the respective merits of domicile and nationality as a determinant of the law to govern status and personal rights generally? Each has its merits and demerits.²

Respective merits of the two conceptions

The English preference for domicile is based on two main grounds. First, broadly speaking, domicile means the country in which a man has established his permanent home, and what can be more natural or more appropriate than to subject him to his home law? It is difficult to agree that he should be excommunicated from that law merely because technically he is a citizen of some State which he may have abandoned years ago.³ Secondly, domicile furnishes the only practicable test in the case of such political units as the British Commonwealth and the United States of America, where the same nationality embraces many diverse legal systems. The expression 'national law' when applied to a British citizen is meaningless. It is one system in England, another in Scotland, another in Quebec and so on.

Merits of domicile

In the course of its development in England, however, the law relating to domicile has acquired certain vices. A short mention of these will suffice here, as they have already been discussed in this chapter.

Demerits of the English conception

First, it will not infrequently happen that the legal domicile of a man is out of touch with reality, for the exaggerated importance attributed to the domicile of origin, coupled with the technical doctrine of its revival, may well ascribe to a man a domicile in a country which by no stretch of the imagination can be called his home.⁴

(i) Sometimes produces unrealistic results

Secondly, an equally irrational result may ensue from the view of the English courts that long residence is not equivalent to domicile if accompanied by the contemplation of some uncertain event the occurrence of which will cause a termination of the residence.⁵

(ii) Insufficient effect given to long residence

¹ For more detailed lists see Wolff, ss. 95-96; Rabel, i. 110-11, 113-15.

² See 61 *L.Q.R.* 363 et seq., where the question is considered in relation to divorce.

³ Of course, if a country which adopts the principle of nationality also accepts the doctrine of *renvoi*, the practical result may be the substitution of the *lex domicilii* for the law of nationality.

⁴ *Supra*, p. 180.

⁵ *Supra*, pp. 180 et seq.

(iii) Domicil often difficult to identify Thirdly, the ascertainment of a man's domicile depends to such an extent upon proof of his intention, the most elusive of all factors, that only too often it will be impossible to identify it with certainty without recourse to the court.¹

Demerits of nationality Nationality, as compared with domicile, enjoys the advantage that normally it is easily ascertainable. Nevertheless, it is objectionable as a criterion of the personal law on at least three grounds.

(i) Nationality and home may differ First, it may be a country with which the *propositus* has lost all connexion, or with which perhaps he has never been connected. It is a strange notion, for instance, that a Neapolitan, who has emigrated to California in his youth without becoming naturalized in the U.S.A., should throughout his life remain subject to Italian law with regard to such matters as divorce and testamentary capacity.

(ii) A man may have a multiple or no nationality Secondly, nationality is sometimes a more fallible criterion than domicile. In the eyes of English law no man can be without a domicile, no man can have more than one domicile at the same time. On the other hand, he may be stateless or may simultaneously be a citizen of two or more countries.

(iii) Nationality no answer if one sovereignty includes several legal systems Thirdly, nationality cannot always determine the internal law to which a man is subject. This is the case, as we have seen, when one political unit such as the United States of America comprises a variety of legal systems. It is also true of the French Empire, which contains several systems of personal law, and of such countries as Czechoslovakia and Poland where the law varies with the provinces. In such cases, the countries that adopt the principle of nationality for matters of personal status recognize that, after nationality has fulfilled its primary function of connecting the *propositus* with a particular political unit, a further auxiliary test is required to connect him with a definite system of internal law. Thus every Czechoslovakian national, even though born and resident abroad, is attached by registration to some district in Czechoslovakia, and, so far as concerns his personal rights, it is the municipal law prevailing in this district that represents his national law. In Poland the governing law depends upon the place of domicile in Poland, and, failing this, upon the domicile of origin.

What is the national law of a British subject?

But the practical question for an English lawyer is:

When the court is directed by English private international law to decide a question concerning a British subject according to the law of his domicile, and it finds that this law refers the matter to the law of

¹ *Supra*, pp. 170 et seqq.

nationality, which of the many legal systems covered by the British flag is to be taken as representing the national law?

There is, in the first place, no presumption that it is the law of England rather than that of any other part of the British Commonwealth.¹ If the *propositus* is domiciled at the relevant time in a British country, the practice is to regard the *lex domicilii* as his national law. If he is domiciled in a non-British country, his domicil of origin represents his national law.² It is in a case of this nature that the principle of nationality may lead to such an eccentric decision as was given in *In re O'Keefe*.³

Perhaps a fair conclusion, speaking very generally, is to say that, as determinants of the personal law, nationality yields a predictable but frequently an inappropriate law, domicil yields an appropriate but frequently an unpredictable law. Conclusion

This division of the world into those countries that adopt the principle of nationality and those that prefer the test of domicil is unfortunate, since it obstructs the movement for the unification of rules of private international law. No effort should be spared to reconcile the opposing views. Perhaps an essential preliminary is that the English legislature should remove some of the archaic doctrines that seem incongruous in their modern environment and should frame a new definition of 'domicil', simpler and more workable and more in accord with the Continental conception of habitual home. The justification for statutory intervention is that there is a growing tendency on the Continent to substitute domicil for nationality as the test of the personal law, but at the same time a natural reluctance to absorb the English principles *in toto*.⁴ Need for the reform of English law

7. *The position of corporations.*⁵

A corporation must be connected with a particular country in order that the different rights and obligations by which it is affected may be assigned to the appropriate system of law. The Factors connecting a corporation with a particular country

¹ *In re Askew*, [1930] 2 Ch. 259, note by Pollock at p. 269.

² 12 *B.T.B.I.L.* 176, commenting upon *In re Ross*, [1930] 1 Ch. 377, and *In re Askew*, *supra*.

³ [1940] 1 Ch. 124, discussed *supra*, p. 73; at *In re Johnson*, [1903] 1 Ch. 826.

⁴ 4 *I.L.Q.R.* 39 et seqq. An amended code along these lines has been recommended by the Private International Law Committee, see Cmd. 9068.

⁵ I acknowledge my heavy indebtedness to Dr. A. Farnsworth for his comprehensive and convincing account of this subject in his monograph on *The Residence and Domicil of Corporations*. He has persuaded me of the many heresies that I enunciated in the second edition of the present work. For other literature see 2 *Grotius Society*, 59 et seqq.; 49 *L.Q.R.* 334 et seqq.; 22 *H.L.R.* 1 et seqq.

subject is not free from difficulty, for the facts, such as nationality, domicil and residence, which connect the individual with a country are at first sight a little incongruous with the nature of an artificial person. Reasoning based on the analogy of a human being is apt to appear somewhat forced and strained. Nevertheless, the analogy has in general been followed by the courts, and the result of their decisions is that a corporation may be connected with a particular country by reason of any one of the following factors: Presence, Residence, Domicil, Nationality. Each of these requires separate treatment, since the country whose law governs the various matters concerning a corporation varies with the character of the question requiring a decision.

Jurisdiction based upon service of process

(i) *Presence*. The decision in 1872 that a foreign corporation is capable of being sued in England¹ necessitated some principle by which to determine its amenability to the jurisdiction.² It is essential to the exercise of jurisdiction that process should be served upon the defendant, and Order ix, Rule 8, of the Rules of the Supreme Court directs how this is to be done in the case of a corporation. It provides as follows:

In the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer or on the town clerk, treasurer, or secretary of such corporation.

The Order does not in terms require that the corporation should be resident or domiciled or incorporated within the jurisdiction, and therefore the problem in the case of a foreign corporation has been to define the circumstances in which such service is permissible.

Service depends upon physical presence of the party

The principle that governs the matter in the case of an individual is that he is subject to the jurisdiction of the English court if he is present in England, or, as it is often put, if he is 'found' in England. If he is found here, he can be served here, and at common law the exercise of jurisdiction depends upon service. It is the same in the case of a corporation. Thus Lord Halsbury, in referring to a French shipping company which leased an office in London and employed an agent there to make contracts on their behalf, tersely remarked, 'They are here, and if they are here they may be served.'³

¹ *Newby v. Van Oppen* (1872), L.R. 7 Q.B. 293.

² See, for a full account, Farnsworth, *op. cit.*, pp. 148 et seqq.

³ *La Bourgogne*, [1899] A.C. 431.

The critical question, therefore, is—what, in the case of a foreign corporation, is the analogue of the physical presence of an individual? The answer given by English law is that the only way in which an artificial entity can show its presence is by the transaction of business, and in order to add precision to this test the courts have laid down the requirements that must be satisfied before the transaction of business by or on behalf of a corporation can justify the inference that the corporation is present in England.¹ The requirements are these.²

Corporation is present here if it does business here

First, the business must have been done *in* England, not merely *with* England. The criterion of this is whether an agent has been employed in England with authority to enter into transactions binding upon the corporation. If his function is, for instance, to accept offers, and he does so, corporate business has been done in England; *aliter*, if his only authority is to transmit offers abroad for acceptance or rejection by his principals.³ Secondly, the agent must have operated at a fixed place of business for a definite period of time. Neither the impermanency of the place nor the short space of time during which business was done there is in itself sufficient to render the corporation immune from process. Thus in one case a foreign motor-car company occupied a stand at a nine days' cycle show at the Crystal Palace, where they were represented by an agent with authority to make contracts on their behalf. It was held that a writ was validly served on the agent under Order ix, Rule 8.⁴

In order to facilitate the service of a writ upon an 'oversea company',⁵ the Companies Act, 1948, has placed it under an obligation to file with the registrar of companies the names and addresses of some one or more persons authorized to accept

Oversea companies

¹ *Okura & Co. Ltd. v. Forsbacka Fernverks Aktiebolag*, [1914] 1 K.B. 715, 718.

² Farnsworth, *op. cit.*, pp. 151, 329-32.

³ *Thames and Mersey Marine Insurance Co. v. Società di Navigazione a Vapore de Lloyd Austriaco* (1914), 111 L.T. 97; contrast *Saccharin Corp. Ltd. v. Chemische Fabrik von Heyden & Co.*, [1911] 2 K.B. 516 with *Okura & Co. Ltd. v. Forsbacka Fernverks Aktiebolag*, [1914] 1 K.B. 715.

⁴ *Dunlop Pneumatic Co. v. Actien Gesellschaft für Motor, & Co., Cudell & Co.*, [1902] 1 K.B. 342.

⁵ Oversea companies are 'companies incorporated outside Great Britain which, after the commencement of this Act [i.e. July 1st, 1948] establish a place of business within Great Britain, and companies incorporated outside Great Britain which have before the commencement of the Act, established a place of business within Great Britain and continue to have an established place of business within Great Britain at the commencement of the Act'; Companies Act, s. 406.

service of process on its behalf.¹ So long as the name of such a person remains on the file, service of a writ upon him renders the company subject to the jurisdiction of the court. If, however, a company fails to comply with its statutory obligation, or if the persons on the register are dead or no longer resident, or if they refuse to accept service, the writ may be served on the company by leaving it at or posting it to 'any place of business established by the company in Great Britain'.² These last words have been interpreted to mean a place of business which is still established at the time of service.³ Service is not adequate if effected at a former place of business that has ceased to function.

Relevancy
of residence

(ii) *Residence*. The residence of a corporation determines its liability for income tax and its commercial domicile in time of war. The general test of residence, however, has been evolved by the courts in the income-tax cases, which will now be briefly considered.

Income-tax
liability
depends
upon
residence

It should first be noticed that liability for income tax depends upon residence, and not upon nationality or, with one exception,⁴ upon domicile. A person residing in the United Kingdom is liable in respect of all profits and gains arising from a trade or business, whether this be carried on in the United Kingdom or elsewhere; and a person who is not so resident is liable only upon such profits as arise from a trade or business exercised within the United Kingdom.⁵ 'Person' includes a corporation. Therefore, if a company incorporated in England trades solely in a foreign country, it is essential to determine whether it is resident in England or abroad.

Residence
depends
upon
control

A company is regarded by the law as resident in the country where the centre of control exists, i.e. where the seat and directing power of the affairs of the company are located. The place of incorporation is only one of the evidentiary facts to be considered in the course of ascertaining where the control resides. This test of control was laid down by the Exchequer Division in *Cesena Sulphur Co. v. Nicholson*,⁶ a decision which has been repeatedly approved and followed,⁷ and which cannot now be overruled.⁸

¹ Companies Act, 1948, s. 407 (1) (c).

² *Ibid.*, s. 412.

³ *Deverall v. Grant Advertising Inc.*, [1955] Ch. 111. See 18 M.L.R. 180-4.

⁴ *Infra*, p. 201.

⁵ Income Tax Act, 1918, Schedule D, Rule 1.

⁶ (1876), 1 Ex. D. 428.

⁷ *San Paulo (Brazilian) Railway Co. Ltd. v. Carter*, [1896] A.C. 31; *Goerz v. Bell*, [1904] 2 K.B. 136; *De Beers Consolidated Mines v. Howe*, [1906] A.C. 455; *American Thread Co. v. Joyce* (1913), 108 L.T. 353.

⁸ *Egyptian Delta Land and Investment Co. v. Todd*, [1929] A.C. 1, at p. 19, per Lord Sumner.

The Cesena company was incorporated in England under the Companies Act for the purpose of taking over and working sulphur mines at Cesena in Italy. The practical business of manufacturing and selling the sulphur was administered by an Italian delegation, including the managing director, who was permanently resident at Cesena. No products were ever sent to England, the books of account were kept in Italy, the company was registered in Italy and two-thirds of the shareholders were resident Italians. Taken by themselves, these facts went to show that the centre of business was in Italy. As against them, however, the memorandum of association set up a Board of Directors in London which controlled the 'sale, order, direction, and management' of 'the working of the company's mines, the mode of the disposal thereof, and the general business of the company'. The shareholders' meetings were held in London, and it was there that dividends were declared.

The Cesena Case

In the result it was held that, since almost every act of the company connected with its management was done in London, the main place of business was in London, and that therefore the company was resident in England. By reason of this residence it was liable to pay income tax upon the whole of its profits, wherever earned.

Thirty years later any doubt that might have lingered as to whether central control was the correct test of residence was dispelled by the House of Lords in the leading case of *De Beers Consolidated Mines Ltd. v. Howe*.¹ This company, unlike the Cesena company, was incorporated not in England but in South Africa, where the whole of its profits were made from the mining and disposal of diamonds. The directors met both in South Africa and in London, but the majority of them resided and met in London, and it was found as a fact that the chief control of the company's affairs resided in the hands of the London board. Thus, the profits, though arising entirely from the raising and sale of diamonds in South Africa, were subject to income tax. Lord Loreburn, in a well-known passage said:

The De Beers Case

'In applying the conception of residence to a company we ought, I think, to proceed as nearly as we can on the analogy of an individual. A company cannot eat or sleep but it can keep house and do business. We ought therefore to see where it really keeps house and does business. . . . The decision of Kelly, C.B. and Huddleston, B. in the *Calcutta Jute Mills Co. v. Mills* and *Cesena Sulphur Co. v. Nicholson* now thirty years ago, involved the principle that a company resides, for the purposes of income-tax, where its real business is carried on. These decisions have been acted on ever since. I regard that as the true rule; and the real business is carried on where the central management and control actually abide.'²

¹ [1906] A.C. 455.

² *Ibid.*, at p. 458.

Company
may have
a dual
residence

The natural inference from these two decisions is that for income-tax purposes it is impossible for a company simultaneously to be resident in two countries. It is difficult to disagree with Lord Atkinson when he said that, since 'the residence is where the central control and management abide, then, unless a thing can have two or three different and separate centres, it would appear to me to be quite impossible, according to the ordinary use of language, that the "central control and management" of a company can at the same time abide in two or more different and separated places'.¹ Nevertheless, the matter cannot be dismissed in this summary though sensible fashion without considering two more leading cases, *Swedish Central Ry. v. Thompson*² and *Egyptian Delta Land and Investment Co. v. Todd*.³ In each of these cases the company was an investment company, i.e. of a passive or static nature, not engaged in active trading operations, but interested solely in the receipt of money arising abroad. In each, the question was whether the company was liable, as being resident in England, for income tax upon money arising abroad.⁴ There were certain similarities in the facts of each case.⁵ In the *Swedish Case*:

The company was incorporated in England in 1870 with the object of constructing and running a railway in Sweden. Its registered office was in London. In 1900 it leased the railway to a traffic company for 50 years at an annual rent of £33,500 payable in England. In the same year the articles of association were altered so as to remove the control and management to Sweden, and after that time the general meetings of shareholders (most of whom were Swedish) and the meetings of the directors were held at Stockholm. Dividends were declared there and no profits were transmitted to England except in the shape of dividends due to the English shareholders. On the other hand, a committee which met regularly was established in London to deal with share transfers, to make out and attach the seal to share certificates and to sign cheques on the London banking account. The secretary resided in London and it was there that the annual accounts were made up and audited.

In the *Egyptian Case*:

The company was incorporated in England in 1904 for the purpose of acquiring and disposing of any land served by the Egyptian Delta Rys. Ltd. Since 1907 the business had been controlled, managed and

¹ *Swedish Central Ry. Co. v. Thompson*, [1925] A.C. 495, at p. 508; see also Atkin L.J. in the court below, [1924] 2 K.B. at p. 274.

² *Supra*.

³ [1929] A.C. 1.

⁴ Income Tax Act, 1918, Schedule D, Cases IV and V.

⁵ For an analysis of them in parallel columns see Farnsworth, *op. cit.*, p. 107.

directed entirely in Cairo. The secretary-general, all the directors, the seal, share register, books and bank account were in Cairo.

In order to satisfy the requirements of the Companies Act, there was a registered office in London where the necessary lists and registers were kept. This office did not consist of a separate room. All that the company did was to employ a Mr. Horne, who carried on the business of secretary of public companies, to keep the necessary documents and to post the name of the company on the door of his office.

The Crown claimed income tax in respect of interest accruing from mortgages and leases of land made in Egypt.

It was held by the House of Lords in the *Swedish Case* that the company was resident both in England and in Sweden; in the *Egyptian Case* that the company was resident only in Egypt.

Difficulty
caused by
the
Swedish
and the
Egyptian
Cases

These two decisions confuse rather than enlighten the law. It is clear, of course, that the business done in England was of a far more substantial character in the *Swedish* than in the *Egyptian Case*. It is also clear that the contention of the Crown in the *Egyptian Case*, that a company is inevitably resident in the country where it has been incorporated and where its registered office is situated, was untenable, for if this were so the decisions in the *Cesena* type of case would have been put upon that short and simple reason. Nevertheless, how is the decision in the *Swedish Case* to be reconciled with the rule established by the House of Lords, and from which no departure is possible, that a company resides where its real business is carried on and that the real business is carried on where the central control and management abide? It can scarcely be said, as Pollock M.R. said, that this is not the only test.¹ If words mean anything, there is a natural reluctance to accept the statement of Lord Cave that 'the central control and management of a company may be divided'.² Again, it is difficult to resist the conclusion that Lord Sumner, in explaining away the *Swedish* decision by the remark that the business done in London was little less important than that transacted in Sweden, virtually repudiated the principle of central control.

The House of Lords must be left to reconcile the apparently irreconcilable. It may be presumptuous to suggest how this can be done, but perhaps the clue lies in the nature of the company concerning which the question arises. Perhaps a distinction must be drawn between a company engaged in active trading operations and one whose affairs and sources of income are in

How can
the cases be
reconciled?

¹ *Swedish Central Ry. Co. v. Thompson*, [1924] 2 K.B. at p. 265.

² *Ibid.*, [1925] A.C. at p. 501.

a more or less static condition. The word 'control', as used in the relevant cases, implies that the company is required to adopt a particular policy and to make vital decisions. If this requisite exists, as it undoubtedly does in the case of the active company, there must be a central control in one country and in one country only. But in the case of the static company there is no 'real business' to be carried on, and no control that affects the destiny of the corporate affairs is called for. The only business to be done is administrative. Therefore, it is perhaps sensible to say that such a company must be deemed to reside in any country where a substantial part of its purely administrative business is carried on. In the *Swedish Case* the English part was substantial, in the *Egyptian Case* it was not.

Domicil is in the country of incorporation (iii) *Domicil*.¹ Questions concerning the status of a body of persons associated together for some enterprise, including the fundamental question whether it possesses the attribute of legal personality, must on principle be governed by the same law that governs the status of the individual, i.e. by the law of the domicile. What this law is admits of no doubt if we reason upon the analogy of the individual. Every person, natural and artificial, acquires at birth a domicile of origin by operation of law. In the case of the natural person it is the domicile of his father, in the case of the juristic person it is the country in which it is born, i.e. in which it is incorporated.² If it is a corporation, it can be so only by virtue of the law by which it was incorporated. It is to this law alone that all questions concerning the creation and dissolution of the corporate status are referred. In the words of Lord Wright:

'English courts have long since recognized as juristic persons, corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. . . . But if the creation depends on the act of the foreign State which created them, the annulment of the act of creation by the same power will involve the dissolution and non-existence of the corporation in the eye of English law. The will of the sovereign power which created it can also destroy it.'³

Thus the tests of domicile and of residence are different. A company is resident where its control and management abide, it is domiciled where it is incorporated.⁴

¹ See generally Farnsworth, *op. cit.*, pp. 201 et seqq.

² *Gasque v. Inland Revenue Commissioners*, [1940] 2 K.B. 80.

³ *Lazard Bros. v. Midland Bank Ltd.*, [1933] A.C. at p. 297.

⁴ *A.-G. v. Jewish Colonization Association*, [1900] 2 Q.B. 556.

But the domicile of a corporation has this peculiarity, that it cannot be changed. It cannot be converted into a domicile of choice. 'The domicile of origin, or the domicile of birth, using with respect to a company a familiar metaphor, clings to it throughout its existence.'¹

Domicil is
unchange-
able

Matters of status concerning a corporation that fall to be determined by the law of its domicile would seem to include, not only its creation and dissolution, but also all those that are regulated by its instrument of incorporation. The well-known words of Bowen L.J., spoken with reference to an English company, seem equally applicable to a foreign corporation.

What
questions
the law of
the domicile
governs

'What you have to do is to find out what the statutory creature is and what it is meant to do; and to find out what this statutory creature is you must look at the statute only, because there, and there only, is found the definition of this new creature.'²

Questions concerning the status of the 'statutory creature', such as whether the individual members are personally liable,³ whether its transactions are *ultra vires*,⁴ or whether it may be represented in legal proceedings by its directors,⁵ are determined by the rules of its constitution as interpreted by the law of its domicile. The only gloss to make upon the statement of Bowen L.J. is that in many legal systems an association of persons may be endowed with the attribute of legal personality without any express statutory incorporation or anything corresponding to it. Thus in Continental countries many unincorporated associations, including partnerships, are persons in the eye of the law. In these cases, it is to be presumed that the status ascribed to the association by the law of the country in which it has been formed will be recognized by English courts.⁶

Although, as we have seen, liability for income tax is based upon residence, there is one case in which domicile is the governing factor. A person resident in the United Kingdom is normally liable to pay tax upon the full amount of income arising abroad whether it is remitted to this country or not. But it is

Income tax

¹ *Gasque v. Inland Revenue Commissioners*, [1940] 2 K.B. 80, at p. 84, *per* Macnaghten J., applying the statement of Sargant L.J. in *Todd v. Egyptian Land and Investment Co.*, [1928] 1 K.B. 152, 173; *Kuenigl v. Donnersmarck*, [1955] 1 Q.B. 515, 535.

² *Baroness Wenlock v. River Dee Co.* (1887), 36 Ch.D., note at p. 685.

³ *General Steam Navigation Co. v. Guillon* (1843), 11 M. & W. 877.

⁴ *Ridson Iron and Locomotive Works v. Furness*, [1906] 1 K.B. 49, 56-57.

⁵ *Banco de Bilbao v. Sancha*, [1938] 2 K.B. 176, 194-5.

⁶ *Von Hellfeld v. Rechnitzer and Mayer Frères & Co.*, [1914] 1 Ch. 748.

enacted that if a person resident but not domiciled in the United Kingdom is entitled to stocks, shares or rents in any place out of the United Kingdom, tax is payable by him only on the income actually received in this country.¹ Thus a corporation, controlled from this country and therefore resident here, would be entitled to this relief upon proof of its incorporation abroad.²

Depends
on place of
incorpora-
tion

(iv) *Nationality*. The test of the nationality of a corporation according to English law is the country of its incorporation,³ but according to most Continental laws the country where its centre of management exists.⁴ It is seldom, however, that its nationality will be relevant to a question of the conflict of laws.

¹ Income Tax Act, 1918, Schedule D, Rule 2, Case IV.

² Farnsworth, *op. cit.*, p. 215.

³ *Janson v. Driefontein Consolidated Mines Ltd.*, [1902] A.C. 484, at pp. 497, 498, 501, 505, Lords Macnaghten, Davey, Brampton, Lindley; *A.-G. v. Jewish Colonization Association*, [1901] 1 K.B. 123, at p. 135, *per* Collins L.J. See the dicta collected and set out by Farnsworth, *op. cit.*, pp. 302-3; *Kuenigl v. Donnersmarck*, [1955] 1 Q.B. 515, 535-6.

⁴ Wolff, p. 308.

PART III
THE LAW OF OBLIGATIONS

CHAPTER VIII. CONTRACTS

CHAPTER IX. NEGOTIABLE INSTRUMENTS

CHAPTER X. TORTS

CHAPTER VIII

CONTRACTS¹

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A. DOCTRINE OF THE PROPER LAW

1. *The theories.*

THE 'proper law of the contract' is a convenient and succinct expression to describe the law that governs many of the matters affecting a contract. It has been defined as 'that law which the English or other court is to apply in determining the obligations under the contract'.² However ascertained, and this as we shall see is the subject of controversy, it consists of a single legal system, but it is essential to appreciate at the outset that not all the matters affecting a contract are necessarily governed by one law. The correct inquiry is not—What law governs a contract? It is—What law governs the particular question raised in the instant proceedings? Different questions may well be determinable by different laws. The questions, for instance, whether agreement has been reached, whether the parties possess capacity, whether the contract is

Meaning
of the
'proper
law'

¹ For a valuable monograph on this subject see Batiffol, *Les Conflits de Lois en matière de Contrats*.

² *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society*, [1938] A.C. 224, 240 (P.C.).

formally valid or what interpretation is to be put upon a particular clause in the contract do not necessarily fall to be governed by the same law. Nevertheless, it may be said that in all cases there is a primary system of law, called the 'proper law', which usually governs most matters affecting the formation and substance of the obligation.

Difficulty
of ascer-
taining the
proper law

The problem of choosing the *lex causae* is more perplexing in the case of contracts than in almost any other topic. In most situations the decisive connecting factor upon which the choice depends is reasonably clear. There is general agreement, for instance, that it is the *locus celebrationis* which indicates the law to govern the formal validity of a marriage, the situation of immovables which discloses the relevant *lex successionis*, and the country in which the propositus is domiciled that determines his personal law. But in the case of a contract there may be a multiplicity of connecting factors: the place where it is made; the place of performance; the domicil, nationality or business centre of the parties; the situation of the subject-matter; the nationality of the ship in the case of a charter-party and so on. Is there, therefore, any one determinant of the proper law?¹

English
view that
intention
of parties
decisive

In the world of today several different solutions have been reached. The United States of America prefer a rigid and inflexible test, represented by the place of contracting in some of the States but by the place of performance in others. In violent contrast to these mechanical criteria, most of the countries on the European continent adopt the doctrine of autonomy under which the parties are free to choose the governing law, though divergent views obtain on the question whether their freedom is absolute or is restricted to the choice of a law with which the contract is factually connected.² The English doctrine is simple enough to state in terms, but not so simple to elucidate. Its origin is the fidelity of the Victorian judges to the Benthamite dogma of *laissez-faire*.³ Its theme is the prerogative of intention. Judicial incantations to this effect are legion and the following two may be given as typical.

Willes J.: 'In such cases it is necessary to consider by what general

¹ For a fuller discussion of this subject see 3 *I.L.Q.R.* 60-73 (F. A. Mann), replied to 3 *I.L.Q.R.* 197-207 (J. H. C. Morris); *Lectures on the Conflict of Laws and International Contracts* (Univ. of Michigan, 1951), pp. 1 et seqq. (R. H. Graveson); Cheshire, *International Contracts*, pp. 7-44.

² For a detailed account see Rabel, *op. cit.*, ii. 368 et seqq.

³ *Lectures on the Conflict of Laws and International Contracts* (University of Michigan, 1951), pp. 6-8 (Graveson).

law the partners intended that the transaction should be governed, or rather by what general law it is just to presume that they have submitted themselves in the matter.'¹

Lord Wright: 'It is now well settled that by English law the proper law of the contract is the law which the parties intended to apply.'²

There are few words less precise or more ambiguous than intention. Its ambiguity in the present context is apparent. Is it, for instance, used subjectively or, as the alternative offered by Willes J. seems to suggest, in a purely objective sense? Does it mean that the parties directed their minds to the matter and in fact reached an agreed conclusion? If the alternative offered by Willes J. describes the true doctrine, does it signify the common intention that the parties would have held had they considered the matter or does it merely mean the intention which as reasonable persons they ought to have formed, having regard to all the relevant factors? Clearly, without a deeper analysis it is scarcely possible to be content with the aphorism that the proper law is the law intended by the parties.

Vagueness
of the
word 'in-
tention'

Another theory is that the proper law is the law of the country in which the contract may be regarded as localized. Its localization will be indicated by the grouping of its elements as reflected in its formation and in its terms.³ The country in which its elements are most densely grouped will represent its natural seat and the law to which in consequence it belongs. It may have factual links with several countries, each of which has some claim to be considered; it may also possess features, such as a distinctive legal phraseology or a provision that the price of goods sold shall be payable in the currency of the place of delivery, which point to the law of one particular country. In most cases, however, an examination of these connecting ties will disclose without undue difficulty the country with which the contract is in fact most closely connected and in which lies its natural seat or centre of gravity. According to the distribution of its factual weight, the reasonable man will instinctively regard it, for instance, as an Italian contract. It was Westlake's considered opinion that this objective method of solving the problem has in practice been adopted by English judges. In the last edition of his *Private International Law*, for which he was partly responsible, published in 1913, after

Theory of
localiza-
tion of
contract

¹ *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115, 120.

² *Vita Food Products Inc. v. Unus Shipping Co.*, [1939] A.C. 277, 289-90.

³ *Jones v. Metropolitan Life Insurance Co.* (1936), 286 N.Y., Supp. 4.

showing that the competition in the English courts had always been between the *lex loci contractus* and the *lex loci solutionis*, with dicta tending to favour the former, he concluded that

'the governing law is in fact selected on substantial considerations, the preference being given to the country with which the transaction has the most real connexion and not to the law of the place of contract as such.'¹

Scope of
intention
according
to the
localiza-
tion theory

The difference between this theory and the theory of intention as expressed, for instance, by Lord Wright in the words, 'the proper law of the contract is the law which the parties intended to apply',² is the difference between objectivity and subjectivity. According to Lord Wright's statement, the court purports to ascertain the actual intention of the parties and is, indeed, prepared to adopt any intention which has been expressly declared. According to the localization theory, the court imputes an intention to the parties, or rather imposes upon them the intention that in the circumstances of the case they should as reasonable men have formed. They are free to choose the connecting factors, such as the *lex loci contractus* and the *lex loci solutionis*, but having done this their intention is taken to be that the governing law shall be the law of the country in which the chosen factors show the contract to be localized. Men must be taken to intend the natural consequences of their acts, and to say that the proper law is the law intended by the parties is, according to the theory of localization, only another way of saying that they must have intended to submit to the law indicated by their own acts. In other words, their intention is decisive but 'only in so far as it appears that the contract and the circumstances in which it was made do not negative that intention'.³ On this view, of course, the express selection of a governing law will not be permissible if it conflicts with the natural seat of the contract as disclosed by the grouping of its elements.

2. *The modern law.*

Ambiguity
of word
'intention'

The modern law depends upon whether the parties have expressly chosen the proper law or not.

(a) *Where there is no express choice of the proper law.*

¹ 5th ed., S. 212. See the remarks of Kekewich J. in *South African Breweries v. King*, [1899] 2 Ch. 173, 182. See also Lord Simonds in *Bonhuyon v. Commonwealth of Australia*, [1951] A.C. 201, 219, where he described the proper law as 'the system of law by reference to which the contract was made or that with which the transaction has the closest and most real connexion'.

² *Supra*, p. 207.

³ Gutteridge, *Cambridge Law Journal* (1936), p. 19.

Although the rule here, as laid down in a multitude of cases, is that the intention of the parties prevails, the difficulty is to discover the exact sense that intention is supposed to bear in this context. Its analysis by the judges in their numerous affirmations of the principle has not been uniform. Some emphasize the presumed intention of the parties and declare that the task of the court is to infer from the terms and circumstances of the contract what their common intention *would have been* had they considered the matter at the time when the contract was made.¹ Others say that the court must determine for the parties what they *ought to have* intended had they considered the matter.

‘What is to be the law by which the contract, or any part of it, is to be governed or applied, must always be a matter of construction of the contract itself, as read by the light of the subject-matter and of the surrounding circumstances.’²

Sometimes these two methods of defining the nature of the inquiry are combined in the formula as if they were equivalent. Thus in a well-known passage Lord Wright said:

‘Then the court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract.’³

It may be said with respect that the statement is scarcely consistent, since the word ‘would’ is not synonymous with the preceding word ‘ought’, but implies that the court is concerned with the presumed intention of both parties.

There is a clear difference between these two views upon the function of intention. According to the first, the court in effect reads an implied term into the contract which purports to represent the common intention of the parties; according to the second, it conjectures no probabilities, but ruthlessly applies the external standard of the reasonable man. The difference, though it may seem trifling, is not without significance.

Difference between presuming an intention and imposing an intention

In the first place, it is a complete myth to regard the ultimate decision by the judge as a fulfilment of the common intention

¹ e.g. the statement of Willes J. in *Lloyd and Guiberti*, cited *supra*, pp. 206–7. See Lord Atkin in *Rex v. International Trustee*, [1937] A.C. 500, 529: ‘If no intention be expressed, the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances.’

² *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589, at pp. 599–600, *per* Bowen L.J.

³ *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd.*, [1938] A.C., 224, 240.

of the parties. For the judge to persuade himself that such is his aim is, as Birkett L.J. stressed in *The Assunzione*,¹ to live in a world of unreality. If, as invariably happens, counsel has argued with force that the plaintiff's mind was throughout directed to the law of *X* and that he would never have agreed to the law of *Y*, as suggested by his opponent, and opposing counsel has argued with equal force that the defendant would never have accepted the law of *X*, how can it be said with any approach to truth that the court, whichever way it decides the matter, will give effect to what both parties would presumably have accepted?

Secondly, artificiality or the resort to fictions can cause little but embarrassment to a judge, and there is certainly no necessity for it in the present context. Instead of suggesting to him that he must embark upon a tortuous inquiry into the hypothetical intention of two persons now at loggerheads on the matter, it will conduce to clearer thinking if he is presented with the straightforward and intelligible problem, difficult though it may be, of deciding what intention two reasonable persons should have formed upon the identity of the proper law, having regard to all the relevant circumstances. He will at any rate be on surer ground if he is directed to impose a reasonable solution upon the parties.

Modern
criterion is
what ought
to have been
intended

In the recent and important case of *The Assunzione*,² the Court of Appeal, though the judgments still retain references to the criterion of the presumed intention, clearly adopted the more realistic and objective test of the reasonable man. Thus Singleton L.J., after considering several of the leading authorities,³ concluded that the statement of Lord Wright cited above⁴ correctly represented the modern law and practice, provided that it was read with the words *or would have* omitted. Thus altered, the rule, according to the learned Lord Justice is:

"Then the court has to determine for the parties what is the proper law which, as just and reasonable persons they ought to have intended if they had thought about the question when they made the contract.

¹ [1954] P. 150, at pp. 185-6.

² [1954] P. 150.

³ *Peninsular and Oriental Steam Navigation Co. v. Shand* (1865), 3 Moore P.C. (N.S.) 272; *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115; *Chartered Mercantile Bank of India, London and China v. Netherlands India Steam Navigation Co. Ltd.* (1883), 10 Q.B.D. 521; *In re Missouri Steamship Co.* (1889), 42 Ch.D. 321; *The Industrie*, [1894] P. 58; *Rex v. International Trustee for the Protection of Bondholders A.G.*, [1937] A.C. 500.

⁴ *Supra*, p. 209.

That, I believe, is the duty upon us, and in seeking to determine the question we must have regard to the terms of the contract, the situation of the parties, and generally all the surrounding facts.¹

In other words, where it has not been expressly chosen, the proper law depends upon the localization of the contract. The court imputes to the parties an intention to stand by the legal system which, having regard to the incidence of the connecting factors and of the circumstances generally, the contract appears most properly to belong. In short, the proper law, as Westlake stressed, is the legal system with which the contract has the most substantial connexion.

On this view of the matter, every term of the contract, every detail affecting its formation and performance, every fact that points to its natural seat is relevant. No one fact is conclusive. It is doubtful, even, whether any useful purpose is served by the traditional practice of regarding certain facts, such as the *locus contractus*, the *locus solutionis* or, in the case of a contract of affreightment, the nationality of the flag, as presumptive evidence of the governing law. To enter upon the search with a presumption is only too often to set out upon a false trail. It may tend to divert attention from the necessity to consider every single pointer. Moreover, where there are several circumstances pointing in different directions, 'a presumption or inference arising from one alone becomes of less importance. In such a case an inference which might be properly drawn may cancel another inference which would be drawn if it stood by itself.'² The contract requires to be regarded as a whole. It is submitted, indeed, that the presumptions fashioned by the Victorian judges now play but a secondary role. The proper course is not to begin with a presumption and then inquire whether there are rebutting circumstances, but to fall back on a presumption only when the circumstances, viewed as a whole, fail to reveal with reasonable certainty the law to which the contract naturally belongs.³

Little
value of
presump-
tions

The court must take into account, for instance, the following matters: the domicile and even the residence of the parties;⁴ the national character of a corporation and the place where its principal place of business is situated;⁵ the place where the

Examples
of relevant
factors

¹ [1954] P. at p. 175.

² *The Assunzione*, [1954] P. 150, at p. 176, *per* Singleton L.J.

³ *Ibid.*, argument of counsel, at p. 156.

⁴ *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589.

⁵ *Re Anglo-Austrian Bank*, [1920] 1 Ch. 69.

contract is made¹ and the place where it is to be performed;² the style in which the contract is drafted, as, for instance, whether the language is appropriate to one system of law, but inappropriate to another;³ the fact that a certain stipulation is valid under one law but void under another;⁴ the matrimonial domicile in the case of a marriage settlement contract;⁵ the nationality of the ship in maritime contracts;⁶ the economic connexion of the contract with some other transaction;⁷ the fact that one of the parties is a sovereign State;⁸ the nature of the subject-matter⁹ or its *situs*;¹⁰ and, in short, any other fact which serves to localize the contract.

The Assunzione

The case of *The Assunzione*¹¹ will sufficiently reveal the method of approach now adopted by the courts in their search for the proper law.

The preliminary question of law that fell to be decided was whether a charter-party, under which an Italian vessel had been chartered by French shippers for the carriage of grain from Dunkirk to Venice, was governed by French or by Italian law. Neither party contended that English law applied.

This contract disclosed the following points of contact with French law:

The charter-party was headed 'Paris, 7th October 1949', and was therefore presumably concluded in France.

¹ *P. & O. Steam Navigation Co. v. Shand* (1865), 3 Moo. P.C. (N.S.) 272; *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79, 82; *The St. Joseph*, [1933] P. 119.

² *Norden Steam Co. v. Dempsey* (1876), 1 C.P.D. 654; *Rouquette v. Overmann* (1875), L.R. 10 Q.B. 525; *In re Franke & Rasch*, [1918] 1 Ch. 470; *Hansen v. Dixon* (1906), 96 L.T. 32; *Kremezi v. Ridgway*, [1949] 1 All E.R. 662.

³ *South African Breweries v. King*, [1899] 2 Ch. 173, 179; *The Industrie*, [1894] P. 58; *Re Hewitt's Settlement, Hewitt v. Hewitt*, [1915] 1 Ch. 228; *The Patria* (1871), L.R. 3 A. & E. 436; *Royal Exchange Assurance Corp. v. Sjörforsäkrings Aktiebolaget Vega*, [1901] 2 K.B. 567; aff. [1902] 2 K.B. 384.

⁴ *Re Missouri Steamship Co.* (1889), 42 Ch.D. 321; *P. & O. Steam Navigation Co. v. Shand* (1865), 3 Moo. P.C. (N.S.) 272, 291-2; *Maritime Insurance Co. Ltd. v. Assecuranz-Union von 1865* (1935), 52 Ll. L.Rep. 16.

⁵ *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573.

⁶ *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115; *The Karnak* (1869), L.R. 2 P.C. 505; *The Gaetano and Maria* (1882), 7 P.D. 1; 137.

⁷ *R. v. International Trustee*, [1937] A.C. 500, 554, 558.

⁸ *Ibid.*, at pp. 531, 557.

⁹ *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354, 383.

¹⁰ *Spurrier v. La Cloche*, [1902] A.C. 446.

¹¹ [1954] P. 150. See this case discussed in 3 *I. & C.L.Q.R.* 356-9; 17 *M.L.R.* 255-9.

The charter-party itself was written in English, but it was followed by a supplement written in the French language.

The bills of lading were written in French and in the French standard form.

The charterers were French brokers and were acting on behalf of the French Government, though this last fact was not known to the shipowners.

On the other hand, there were the following points of contact with Italian law:

The ship flew the Italian flag and was owned by two Italian brothers carrying on business at Genoa and Naples.

Italy was the place of performance in the sense that delivery was due at Venice.

Freight and demurrage were payable at Naples in Italian currency.

The bills of lading had been endorsed to the consignees in Italy.

Thus sufficient ammunition was available to each party. The ~~French and Italian elements were almost equally poised. The~~ charterers, for their part, invoking the well-worn presumption in favour of the *lex loci contractus*, based their main argument upon the French place of the contract. This, however, made little impression on the court. Not only was it a single incident among many, but to argue that the contract had been concluded in the true sense in France was to ignore the fact that all the material terms of the bargain had been negotiated in letters and telegrams passing between Genoa and Paris, so that the contract was virtually complete before the formal charter-party was sent to the charterers. The heading 'Paris' was almost an accidental circumstance.¹ On the other hand, the court was equally unimpressed by the argument of the shipowners that the nationality of the ship was decisive in favour of Italian law, for again it was only one out of several significant elements.

Since, therefore, there was no outstanding fact of decisive significance, it was necessary to weigh in the balance all the relevant points of contact and thus identify the country to which the contract properly belonged. According to the external standard of the reasonable man, ought it to be regarded as Italian or French in character? The judgments in both courts were unanimous in favour of Italian law, and there is no doubt that in the opinion of the Court of Appeal the crucial fact was the obligation of the charterers to pay freight and demurrage at

¹ Ibid., at p. 181, *per* Birkett L.J.

Naples in Italian currency. It was this which tipped the scales in favour of Italian law.

May the parties choose any law? (b) *Where there is an express choice of the proper law.* The principle that the parties to a contract may expressly select the proper law is undoubtedly admitted by English law. What is not clear, at any rate in the present submission, is whether their freedom in this respect is to be regarded as so complete that they may choose any law in the world, however alien it may be to the factual character of the contract; or whether their choice must be restricted to some law with which the contract is already factually connected. Could the parties in *The Assunzione*,¹ for instance, have effectually agreed that the formal and substantial validity of the contract should be governed by the law of Peru?

Merits and demerits of complete freedom Judged by the standard of convenience, it may be said that for the parties to have this unrestricted freedom is all to the good, since it produces certainty where otherwise everything might be uncertain. It puts the proper law beyond a peradventure and thus saves the cost and delay of a disputed trial. Judged by the standard of common sense, however, it is not so attractive, since it may, if capriciously exercised, subject the parties to a law that is unrealistic to the point of absurdity. Nothing but embarrassment seems to be gained by allowing the parties to convert their Italian contract into a Peruvian contract by calling it one. Nevertheless, there are judicial dicta of great weight which would admit this unbounded licence.

Dicta favouring complete freedom

‘Their intention’, said Lord Atkin, ‘will be ascertained by the intention expressed in the contract, if any, which will be conclusive.’²

Again, in a case where it had been objected that the express choice of English law was not permissible since the contract had no connexion in fact with England, Lord Wright said:

‘But where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible.’³

He later affirmed that ‘connexion with English law is not as a matter of principle essential’. Moreover, the prevailing opinion in the profession and among merchants engaged in international trade is that these statements accurately represent

¹ *Supra*, p. 212.

² *Rex v. International Trustee*, [1937] A.C. 500, 529.

³ *Vita Food Products Inc. v. Unus Shipping Co.*, [1939] A.C. (P.C.) 277, 290.

the law. On the other hand, the latest judicial pronouncement on the matter is that the court will not necessarily regard the intention expressed by the parties 'as being the governing consideration where a system of law is chosen which has no real or substantial connexion with the contract looked upon as a whole'.¹

The view that the choice of the parties is unfettered derives what at first sight appears to be support from the arbitration cases, i.e. cases in which the parties have agreed that any dispute arising between them shall be submitted to the courts or to an arbitrator in a particular country. This is a common feature of international commerce.² Thus in the grain trade from America to Europe the standard form of contract issued by the London Corn Association containing such a provision is regularly used. Similar forms issued by the London Rubber Trade Association, the London Rice Brokers Association, the London Cattle Food Trade Association, and the London Copra Association are also in constant use.³

Significance of the arbitration cases

An agreement of this nature is more than a mere submission to the jurisdiction of the judicial or arbitral tribunals in the specified country. It is an express choice of the law of that country, for the English courts are committed to the view that *qui elegit judicem elegit jus*.⁴ It is well established that such an agreement is effective⁵ and there can be little doubt that, if the case arises, it will still be regarded as effective even though the contract in other respects is totally unconnected with the designated forum. The implication, therefore, is that by the device of an arbitration clause the parties may arbitrarily select any law in the world to govern their contract.⁶

¹ *In re Claim by Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, at p. 341, per Upjohn J.

² Rabel, *op. cit.*, p. 377.

³ *Ibid.*, at p. 378.

⁴ *N.V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co.*, [1927] A.C. 604; *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202, at p. 213.

⁵ *Hamlyn v. Talisker*, [1894] A.C. 202; *Spurrier v. La Cloche*, [1902] A.C. 446; *Austrian Lloyd S.S. Co. v. Gresham Life Assurance Soc. Ltd.*, [1903] 1 K.B. 249; *Pena Copper Mines Ltd. v. Rio Tinto Co. Ltd.* (1911), 105 L.T. 846; *Norske Atlas Insurance Co. Ltd. v. London General Insurance Co. Ltd.* (1927), 43 T.L.R. 541; *N.V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co.*, [1927] A.C. 604; *Kirchner & Co. v. Gruban*, [1909] 1 Ch. 413; *Perry v. Equitable Life Assurance Soc. of U.S.A.* (1929), 45 T.L.R. 468.

⁶ In the majority of the cases there has been a close factual connexion with the English forum, even in *N.V. Kwik Case*, *supra*, where the contract provided that a confirmed credit should be opened in England; see counsel's statement at p. 605.

Law to
govern
creation of
obligation
not a
matter of
choice

Leaving aside the arbitration cases, there is no justification for the view that the parties are free to submit every aspect of their contract to any law that they may see fit to choose, unless, of course, it is also the proper law according to the objective standard. A distinction must be drawn between the creation of a binding obligation and the reciprocal rights and obligations that arise once the valid obligation has been established. The preliminary question, whether the parties are contractually bound, the one to the other, must in the nature of things be governed by a law independent of their volition.¹ It must be governed by the law to which the contract naturally belongs, ascertained objectively in the light of all the circumstances. If, for instance, that law is English, a party under twenty-one years of age will not be legally bound merely because he is of full capacity by some other law expressly chosen to govern the contract. 'Allowing the parties to choose the law in this regard involves a delegation of sovereign power to private individuals.'² That autonomy has no place in the choice of a law to govern the creation of a contract has been affirmed more than once by eminent judges in the common law countries.

'Some law must impose the obligation, and the parties have nothing whatsoever to do with that, no more than with whether their acts are torts or crimes.'³

'Parties cannot by agreeing that their contract shall be governed by the law of a foreign country exclude the operation of a peremptory rule otherwise applicable to their transaction.'⁴

'I do not believe that parties are free to stipulate by what law the validity of their contract is to be determined.'⁵

Position
illustrated
by gra-
tuitous
contract

Though it seems almost a truism that the law to determine whether a binding obligation has been created cannot be left to the free will of the parties, the fact is of such fundamental importance that it may not be out of place to substantiate it by a series of elementary hypotheses.

Suppose that a written agreement is made in England between two

¹ Wharton, *Conflict of Laws*, ii. 900 (3rd ed. by Parmele); *Boissevain v. Weil*, [1949] 1 K.B. 482, at pp. 490-1.

² Lorenzen, 30 *Columbia Law Review*, 658.

³ *E. Gerli & Co. v. Cunard S.S. Co.* (1931), 48 F. (2d) 115, *per* Learned Hand J.

⁴ *Mynott v. Barnard* (1939), 62 Comm. L.R. (Australia) 62, at p. 80, *per* Latham L.J.

⁵ *Boissevain v. Weil*, [1949] 1 K.B. 482, at p. 490, *per* Denning L.J.

Englishmen by which *A* agrees to pay £500 a year for five years into a London bank to the credit of *B*'s account.

This English agreement is clearly void for want of consideration.

Next, suppose that a clause is added providing that 'this agreement shall be valid, notwithstanding the absence of consideration'.

This is nothing but a derisory attempt to avoid a rule that is essential to the creation of a binding obligation.

Alternatively, suppose the insertion of a clause which provides that 'this agreement shall be subject to Scots law'.

This attempt to save the contract by evoking the more favourable doctrine of Scots law, that a gratuitous promise is binding if the promisor clearly intends to bind himself and expresses his intention in plain terms, must obviously fail. It is an abortive attempt to exclude indirectly what cannot be excluded by its direct rejection.

Finally, let the facts be altered by importing a foreign element into the original agreement. Suppose that the promisee, *B*, is a Scotsman, domiciled and resident in Scotland and that there is an express clause providing that the agreement shall be governed by Scots law.

Is it credible that an action for breach of the agreement will succeed in an English court? Regarded objectively according to the grouping of its elements, this is essentially an English contract, and it is idle to suggest that the English conditions of validity can be jettisoned by the simple device of choosing a more amenable law.¹

It is important to observe the impact upon the arbitration cases² of this principle which relegates any issue affecting the valid creation of a contract to the proper law as objectively ascertained. The danger here is a tendency to attribute too wide an operation to the maxim *qui elegit iudicem elegit jus*.³ It

Position
in the
arbitration
cases

¹ Thus Dicey, after stating that where the intention of the parties is expressed in words 'this expressed intention determines the proper law of the contract' (p. 584), continues: 'Nevertheless, no one can maintain that persons who really contract under one law can, by pretending that they are contracting under another law, render valid an agreement which that [*sic*] law treats as void or voidable. If it is clear that they meant to contract with reference to one law, e.g. the law of Scotland, no declaration of intention to contract under another law, e.g. the law of England, so as to give validity to the contract, will avail them anything' (pp. 586-7).

² *Supra*, p. 215.

³ *Supra*, p. 215.

must be restricted to questions other than one concerned with the existence of a valid obligation. Had the parties, for instance, in *The Assunzione*¹ arranged for arbitration in England, the arbitrator, if called upon to decide whether agreement had been prevented by operative mistake, would have been bound to determine that particular matter in accordance with the law of Italy.

The Torni That the valid creation of an obligation is not a matter to be referred to any law that the parties may please to select is borne out by the decision of the Court of Appeal in *The Torni*.² In that case:

Oranges were shipped at Jaffa upon an Estonian ship for carriage to Hull. The bills of lading, signed at Jaffa by the directors of a Palestinian company, each provided that: 'This bill of lading, wherever signed, is to be construed according to English law.' A Palestinian Ordinance provided that every bill of lading issued in Palestine should contain a clause subjecting it to the Hague Rules and that failing such a clause it should be deemed to be subject to them. In the instant case the clause was omitted.

It was argued that English law applied as having been expressly selected and that therefore the Hague Rules were excluded, for, though they are part of English law they affect only outward shipments from England, not an inward shipment such as this was. The argument was rejected both by Langton J. and by the Court of Appeal. Greer L.J. read the Ordinance as an imperative order imposed upon parties contracting for the shipment of goods from Palestine to incorporate the Rules by an express clause. To make a contract without the clause was to make an illegal contract.³ The position, regarded from a slightly different angle, was that the law of Palestine, which was the proper law in the objective sense,⁴ ordained that no contract for outward shipment should be valid unless it contained or was deemed to contain a clause adopting the Hague Rules. It was not open to the parties to avoid this peremptory rule affecting the creation of the contractual obligation by the simple device of submitting themselves to a different legal system. The reference to English law, however, was by no means otiose in other respects. Its significance was that the bill

¹ *Supra*, p. 212.

² [1932] P. 27, affirmed 78.

³ *Ibid.*, at p. 87.

⁴ 'There is much to be said for the application of English law, but in my view still more to be said for the application of the law of Palestine'; *ibid.*, at p. 39, *per* Langton J.

of lading was to be construed according to the law of England, but only on the assumption that it had incorporated the Rules.¹

Unfortunately, the decision of the Privy Council in *Vita Food Products Inc. v. Unus Shipping Co.*² has cast doubts on the proposition that parties are not free to submit the validity of their contract to any law of their own choosing. The facts were these: *The Vita Food Case*

A Newfoundland statute provided that the Hague Rules should govern any contract of carriage from that country and that every bill of lading in respect of such carriage should contain an express clause making the Rules applicable. A Newfoundland shipping company, having agreed to carry goods from there to New York, signed bills that omitted the express clause. The bills expressly provided that the contract should be governed by English law. *Both the Rules and the bills themselves exempted the company from liability for the negligence of the master.* Newfoundland was admittedly the country with which the contract had the most substantial connexion. There was no factual connexion with England whatsoever.³ The cargo was damaged owing to the negligent navigation of the master, and the question was whether the company was liable.

All three courts which heard the case gave judgment for the company, but on different grounds. An unassailable ground would appear to be that the Newfoundland statute, by a provision that clearly affected the creation of the contract, compulsorily imposed the Hague Rules upon the parties, and it was therefore by virtue of these Rules that the company could justify their exemption from liability. The Privy Council, however, dissenting from *The Torni*,⁴ preferred a different reason.

In their opinion the immunity of the company rested upon the exemption clause in the contract, not upon the Rules. It could not be rested upon the Rules, for the selection of English law to govern the contract was effective, despite the absence of any connecting factor with England, and by English law the Rules apply only to an outward shipment from England, not to a shipment from any other country.

The significant and surprising implication of this reasoning is that had the Rules imposed liability for negligence, the Privy Council would have disregarded them and in reliance on the

¹ Ibid., at p. 84, *per* Scrutton L.J.: 'I give perfectly sufficient effect to the clause about English law, if it has any effect, by saying: "Yes, here is the bill of lading with their terms in it. Now construe it according to English law."'

² [1939] A.C. 277.

³ Though the Board, *per* Lord Wright, suggested a connexion on the ground that 'the underwriters are likely to be English'; p. 291. ⁴ *Supra*, p. 218.

exemption clause would have found the shipowners blameless. Another surprising implication of the reasoning is that it condones the avoidance of the Hague Rules, though these have been carefully designed to bring about uniformity in the maritime law of civilized nations. The point was made by Langton J. in *The Torni*,¹ where, after showing that the Rules have been adopted both by Palestine and England said: 'But since in each case they apply only to outward shipments they would not, if English law were held to apply, cover a shipment such as this from Palestine. The position, therefore, would be produced in which a shipment from a country governed by the Hague Rules, made to a country also governed by the Hague Rules, would escape the Hague Rules.'

The decision has been the subject of considerable criticism, mostly adverse,² and the suggestion may be ventured with some confidence that the courts will not allow it to disturb the principle that the parties are not free to choose the law by which the validity of their contract is to be determined.

Incorporation of foreign law distinguished from choice of proper law A final word of caution is necessary. It is important to distinguish carefully the express selection of the proper law from the quite different process of the incorporation in the contract of certain domestic provisions of a foreign law.³ There are two different courses open to the parties. They may, within the limits already discussed, select a given law as a whole to govern the contract or, having already created a contract that is valid according to the law to which it naturally belongs, they may incorporate therein the domestic and relevant rules of some other legal system. This incorporation may be effected either by a verbatim transcription of the relevant provisions or by a general statement that the rights and liabilities shall in certain respects be subject to the chosen law. The latter is only a shorthand method of expressing the agreed terms. Thus the parties to an English contract for the sale of goods may expressly provide that their duties with regard to performance shall be regulated by the rules contained in the Swiss code.

Effect of incorporation It is well established that this right of incorporation may be freely exercised.⁴ Whether the foreign provisions are tran-

¹ [1932] P. 27, at p. 37.

² 56 L.Q.R. 320; 3 I.L.Q.R. 197; Cook, *Logical and Legal Bases of Conflict of Laws*, pp. 419-32; Falconbridge, *Conflict of Laws* (2nd ed.), pp. 400 et seqq.; Cheshire, *International Contracts*, pp. 31-33.

³ 18 B.Y.B.I.L. 100-1.

⁴ *Ex parte Dever* (1887), 18 Q.B.D. 660; *Dobell v. Steamship Rossmore Co.*, [1895] 2 Q.B. 408; *Rowett Leakey & Co. v. Scottish Provident Institution*

scribed verbatim or adopted by a general reference to the foreign code, they become English terms of the contract and must be construed as such.¹ Moreover, they remain constant in the sense that they are unaffected by any change in the relevant Swiss law occurring after the date of the contract. On the other hand, a proper law intended as a whole to govern a contract is administered as 'a living and changing body of law',² and effect is given to any changes occurring in it before performance falls due.³

The distinction between the incorporation of foreign provisions and the choice of the proper law explains certain judicial statements which at first sight seem to allow the parties an unrestricted right to select the governing law. In one case, for instance, Bowen L.J. said:

Right of incorporation no authority for right to select proper law

'It is open in all cases for parties to make such agreement as they please as to incorporating the provisions of *any* foreign law with their contracts.'⁴

Statements of this nature certainly do not warrant the assumption that parties may submit their contract as a whole to the law of a country with which it has no factual connexion. They are directed to a different question. In the words of an American judge:

'It is quite true that civilized law will generally make part of their obligations whatever the parties choose to incorporate into their provisions, foreign law like anything else. . . . But the parties cannot select the law which shall control, except as it becomes a term in the agreement, like the by-laws of a private association.'⁵

B. PARTICULAR TOPICS

I. CAPACITY

What law governs capacity to make a mercantile contract is a matter of speculation so far as the English authorities are concerned. There is no clear decision and the *dicta* are not very

No English authority

(1926), 42 T.L.R. 331; *Ocean Steamship Co. v. Queensland State Board*, [1941] 1 K.B. 402.

¹ *Dobell v. Steamship Rossmore Co.*, [1895] 2 Q.B. 408.

² Wolff, *Private International Law*, p. 424.

³ *Re Chesterman's Trusts*, [1923] 2 Ch. 466, 478. *In re Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, at pp. 341-2.

⁴ *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589, 599.

⁵ *Louis-Dreyfus v. Paterson Steamships Ltd.* (1930), 43 F. (2d) 824, per Judge Learned Hand.

helpful. According to Cotton L.J., it is a 'well-recognized principle of law' that the *lex domicilii* governs,¹ but Lord Greene suggests 'high authority' for the view that the question is determined 'not by the law of the domicile, but by the *lex loci*'.² It is clear, at any rate, that the choice lies between the *lex domicilii*, the *lex loci contractus*, and the proper law in the objective sense.

Lex domicilii not satisfactory It is now generally conceded that in modern conditions of trade domicile is not a satisfactory test. It is incompatible with justice and with the trust that lies at the basis of mercantile dealings, for instance, that a person over twenty-one years of age should be able to escape liability for the price of goods sold and delivered to him in a London shop on the ground that he is still an infant by his *lex domicilii*. Even on the Continent the rule that capacity is governed by the personal law cannot be relied upon by a party who, though *incapax* by his personal law, is *capax* by the *lex loci contractus*.³ There would be less objection to the *lex domicilii* if it were understood as indicating the rule that would be applied at the domicile, not to a purely domestic case, but to one containing a foreign element. A rule imposing an incapacity is not necessarily intended to be extra-territorial in scope. The policy which it is designed to serve must be ascertained before it can be said whether it has such a wide effect.

If, for instance, a person domiciled in England and over twenty but not yet twenty-one years of age were to be sued by a Swiss plaintiff for breach of a contract made and performable in Switzerland, could he successfully plead his minority, though majority is reached in Switzerland at the age of twenty?

Linguistically, indeed, the section of the Infants Relief Act which provides that certain contracts by persons under twenty-one years of age shall be 'absolutely void' embraces contracts wherever made, but the court might well restrict the rule, and

¹ *Sottomayor v. De Barros* (No. 1) (1877), L.R. 3 P.D. 1, 5. Although this was a marriage case, Cotton L.J. applied his statement to *any* contract. He was severely criticized in the later *Sottomayor Case* (1879), L.R. 5 P.D. 94, 100, but in *Cooper v. Cooper* (1888), L.R. 13 A.C. 88, was supported by Lord Halsbury.

² *Baindail v. Baindail*, [1946] P. 122, 128; to the same effect Sir Creswell Creswell in *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67. In *Republica de Guatemala v. Nunez*, [1927] 1 K.B. 669, 689, Scrutton L.J. said the matter was determinable either by the *lex domicilii* or by the *lex loci*: Lawrence L.J., at p. 700, declined to give a final opinion.

³ Wolff, op. cit., p. 282.

it would be reasonable for it to do so, to contracts governed in other respects by English law.¹ So far, however, English courts have not been pressed to adopt this attitude.

It has frequently been advocated that the *lex loci contractus* governs the question of capacity.² This view, if it implies that the *lex loci* exclusively governs the matter, is clearly untenable, for it would enable a party to evade an incapacity imposed upon him by the law that governs the contract in other respects by the simple device of concluding the contract in a country where the law is more favourable. Moreover, the *lex loci* is ill adapted to govern the matter if, as may well happen, the parties conclude the contract in a place where they are only transiently present.

It is, however, now generally agreed that capacity is regulated by the proper law of the contract, provided that this expression is taken to mean the law of the country with which the contract is most substantially connected.³ Intention cannot here be allowed free play.⁴ A person cannot confer capacity upon himself by deliberately submitting himself to a law to which factually the contract is unrelated. For example:

The plaintiff, an English merchant, makes a contract in Paris with the defendant, a person domiciled in England and over twenty but under twenty-one years of age, by which he agrees to sell non-necessary goods to the defendant, delivery and payment to take place in London. It is expressly stipulated that the contract shall be governed by Swiss law.

Objectively regarded, this is an English contract void by English law and it would be idle to suggest that it is validated by the reference to Swiss law. But if it were made by the English infant with a Swiss merchant and if it related to acts performable solely in Switzerland, it would not be unprincipled to recognize its validity according to Swiss law. This law admittedly governs the valid formation of the contract in other respects and it seems only sensible that its control should extend to the question of capacity. It is true, of course, that the defendant would escape from an incapacity imposed upon him by the English law of his domicile, but quite apart from the fact that the contract has no material connexion with England, it

¹ See Cook, *Logical and Legal Bases of Conflict of Laws*, pp. 270 et seqq.

² *Baindail v. Baindail*, [1946] P. 122, 128; Foote, *Private International Law* (5th ed.), p. 376.

³ Dicey, p. 619.

⁴ *Cooper v. Cooper* (1888), L.R. 13 App. Cas. 88, 108, *per* Lord Macnaghten.

does not follow, as we have seen, that the English rule is intended to affect transactions of a substantially foreign character.

Male v. Roberts That the proper law objectively ascertained regulates capacity is not inconsistent with the decision of Lord Eldon in *Male v. Roberts*.¹ In that case:

The defendant, an infant domiciled in England, was sued upon what may be called a Scottish contract that he had made in Edinburgh. Lord Eldon, in dealing with his plea of infancy, said that his omission to give evidence of Scottish law upon the matter was fatal to this defence, since 'the law of the country where the contract arose, must govern the contract'.

On the surface, this statement favours the *lex loci contractus*. The inference is otherwise, however, if the words are translated into language appropriate to the present state of private international law. In effect Lord Eldon ruled that capacity is governed by the law that governs the contract. In his time, and indeed for many years afterwards, the judges, when required to identify the governing law of a contract, laid overwhelming stress upon the *locus contractus*. After a century and a half of development, however, a more flexible test has been evolved, and the modern equivalent of 'the law of the country where the contract arose' is the law of the country with which the contract has the most substantial connexion.

II. FORMATION OF THE CONTRACT

1. *Formation of the agreement*

(i) *The fact of agreement.*

Consensus ad idem The first essential to the creation of a valid contract is that the parties should have reached agreement—that there should be *consensus ad idem*. In one sense this is a question of fact dependent upon whether there has been the acceptance of an offer, but it is the law that determines what constitutes an offer and its acceptance, and in a foreign element case the answer may vary with the legal system that is chosen to govern the matter, since the criterion of a completed agreement is not the same everywhere. Thus some systems take a contrary view to English law and hold that the silence of the offeree may constitute acceptance.² There is also a divergence of view upon the

¹ (1800), 3 Esp. 163.

² Wolff, *op. cit.*, p. 439; Beale, *op. cit.*, p. 1073.

moment at which an acceptance becomes effective and irrevocable. There are three main theories:¹

First the mail-box or dispatch (*expedition*) theory, current in common law countries, which regards agreement as complete upon the mere posting of the acceptance, irrespective of whether it reaches the offeror.

Secondly, the theory of reception, according to which there is no agreement until the acceptance is received.²

Thirdly, the theory of knowledge, which requires that the acceptance should come to the knowledge of the offeror.³

This diversity may produce a difficult problem. Suppose, for instance, that:

What law determines whether agreement complete?

A mails an offer in London to *B* in Hamburg; *B* mails an acceptance in Hamburg, but his letter is lost. By English law there is a completed agreement,⁴ by German law there is not. Which law governs the matter?

There are various possibilities, but two in particular may be mentioned, namely, the putative proper law⁵ and the *lex loci contractus*.

It is submitted that the former, i.e. the law that would be the proper law in the objective sense, assuming that a contract had been effectively created, should govern the matter.⁶ It seems essential that the valid creation of a contract in all its aspects should as far as possible be subject to a single law. On this basis the governing law in the hypothetical case given above would depend upon whether the proposed contract would be more closely connected with England or with Germany.

Claims of the putative proper law

There is little doubt, however, that the English judges prefer the theory of the *lex loci contractus*. Logically, of course, the application of this law is inadmissible, for if the question is whether the agreement was made it is a *petitio principii* to purport to apply the law of the country where it was made. Again, it is generally conceded that a contract is made where the last act necessary to constitute agreement is done. But since the last act is either the posting or the receipt of the acceptance

English law applies the *lex loci contractus*

¹ For a more detailed list see Visscher, 19 *Revue de droit international et de législation comparée* (3rd series), pp. 90-91; Rabel, op. cit. ii. 453.

² Germany, Austria, Norway, Sweden and Denmark.

³ Italy, Spain, Portugal, Belgium, Romania and Bulgaria.

⁴ *Household Fire Insurance Co. v. Grant* (1879), 4 Ex. D. 216.

⁵ Advocated by Wolff, op. cit., p. 439.

⁶ Contrary to the submission made earlier in Cheshire, *International Contracts*, pp. 53-54.

according as English or German law is chosen, there is no option but to make a purely arbitrary choice. The escape from these difficulties is afforded by the fundamental principle of our private international law that a connecting factor, in this case the *locus contractus*, must be given its English meaning.¹ In the hypothetical case set out on the previous page, for instance, the court would identify Germany as the *locus contractus*, since it was there that the acceptance was posted.²

Thus, in *Benaïm v. Debono*,³ where an offer to sell anchovies, which had been posted in Gibraltar, was accepted by a cable dispatched from Malta, the Privy Council said:

'No doubt this contract should be regarded as made in Malta, for thence came the final acceptance of the offer.'

Objections
to the *lex*
loci con-
tractus

To solve the question in this manner, by the extension of a purely domestic rule to a foreign element case, raises an exception to the principle that the creation of a binding obligation is a matter within the exclusive control of the proper law objectively ascertained, and it is not, indeed, entirely satisfactory in other respects, for if the rule is not the same in both countries the decision will vary with the forum in which action is brought. Again, the English post-office rule is admittedly arbitrary even in the field of domestic law, and it is ill adapted for cases involving a conflict of laws.⁴

It has now been held that the mail-box rule recognized in the common law countries is exceptional and that other cases, where the parties are in different countries but where the communications passing between them have been instantaneous or practically so, are governed by the general principle that no agreement is complete until the acceptance is received by the offeror. If, for example, the offer is transmitted by Telex from London to Amsterdam and the acceptance is received on the offeror's Telex machine in London, the agreement has been made in England.⁵ The same rule applies in the case of telephonic communications.

¹ *Supra*, pp. 52-53. This is the view adopted in Italy, see the case of *Soc. Andre v. Soc. C.I.E.S.* in 1954, discussed in 4 *I. & C.L.Q.R.* 396-7.

² *Benaïm v. Debono*, [1924] A.C. 514; see also *The Queen v. Doutré* (1884), L.R. 9 App. Cas. 745, 751. By Art. 65, para. 1 of the proposed French code, a contract is deemed to be made in the place where the acceptance is given.

³ *Supra*.

⁴ Cook, *op. cit.*, p. 369. Moreover, a rule directed to determining *when* a contract was made is not necessarily appropriate to determine *where* it was made.

⁵ *Entores Ltd. v. Miles Far East Corporation*, [1955] 2 Q.B. 327.

(ii) *The reality of agreement.*

An agreement in fact is not necessarily an agreement in law. What law governs mistake? Though apparent, it may not be real in the sense that it may have been due to the mistaken belief of one or both of the parties. What law, then, determines the effect of an alleged mistake? The question may be important, for the rules on the matter vary considerably in different legal systems. The German code, for instance, in direct opposition to English law, allows a party to avoid a contract on proof that he would not have made it had he known and appreciated the true facts.¹

If, for instance, in the hypothetical case suggested above of the acceptance posted in Hamburg,² the English offer had been to sell certain machinery which the German mistakenly believed would fulfil the particular purpose for which he required it, the factual agreement resulting from his acceptance would be binding by English Law³ but voidable by German law.

There is no English authority, but two propositions seem clear on principle. First, the law which determines whether an apparent agreement has been made must also determine whether the agreement is real. There are two constituent elements of a legal agreement—consent in fact and consent free from what the law regards as operative mistake. Logically, these two elements should not be separated and assigned to different laws. The formation of agreement constitutes a single question submissible to one and the same law. Secondly, the question whether agreement has been prevented by operative mistake should be left to the putative proper law—the law to which the contract naturally belongs—and not to the *lex loci contractus* as such, for the mere place of contracting is an unsubstantial ground upon which to determine what law shall govern a matter so vitally affecting the creation of the obligation. Governing principles

If, therefore, it becomes finally and firmly established that the existence of an apparent agreement is governed by the *lex loci contractus*, it is to be hoped that the courts will defy logic and will not extend the rule to the question of reality of agreement.

¹ See Schuster, *The Principles of German Law*, p. 95.

² *Supra*, p. 225.

³ Presuming, of course, that there had been no misrepresentation and that the buyer had not made known to the seller the purpose for which he required the goods.

2. *Conversion of agreement into a binding contract*(i) *Formal validity.*

No decisive
authority

The identity of the law that governs the formal validity of a mercantile contract has not yet been judicially considered in England. Early juristic opinion, now mostly abandoned, advocated the rigid and exclusive application of the maxim *locus regit actum*. A contract was to be void unless it complied with the formalities of the *lex loci contractus*. The local formalities were not only optional, but compulsory.

Compliance
with *lex loci*
contractus
sufficient

There can be no doubt that compliance with the local form is sufficient,¹ though in other respects the contract may be totally unconnected with the *locus contractus*. This is defensible on grounds of justice and convenience, for it is essential that parties who conclude their contract in a given country should be free to follow local professional advice upon the form necessary for the creation of a binding obligation.

Compliance
with *lex*
loci con-
tractus not
essential

There is, however, neither justification nor authority for the view that observance of the local form is compulsory. If, for instance, two Englishmen make a contract by which the one agrees to act in a play to be produced by the other at a London theatre, the mere fact that they sign a memorandum to this effect in some foreign place scarcely requires that the one question of formal validity should be tested exclusively by the *lex loci contractus*. The place may be accidental. It may even be uncertain, as for instance when the parties conclude the transaction in the Simplon-Orient express to Istanbul. Moreover, if English law governs the contract in every other respect, as obviously it does, why should the single question of formal validity be imperatively referred to another law?² It has been usual in the past to vindicate the exclusive application of the *lex loci contractus* by relying upon the rule that the *lex loci celebrationis* governs the formal validity of a marriage ceremony³ and also upon certain dicta culled from cases dealing with the effect of a failure to stamp a document according to the revenue requirements of the place of execution.⁴ The marriage rule may be dismissed as irrelevant, for it is obvious

¹ *Guepratte v. Young* (1851), 4 De G. & Sm. 217.

² See Wolff, op. cit., p. 446.

³ *Kent v. Burgess* (1840), 11 Sim. 361; *Warrender v. Warrender* (1835), 2 Cl. & F. 488.

⁴ *Alves v. Hodgson* (1797), 7 T.R. 241; *Clegg v. Levy* (1812), 3 Camp. 166; *Trimbey v. Vignier* (1834), 1 Bing. N.C. 151; *Bristow v. Sequeville* (1850), 5 Ex. 275.

that a marriage ceremony stands in a category of its own. The official who performs the ceremony cannot do otherwise than satisfy the regulations of the local law which it is his duty to administer. As for the stamp cases, there are a few dicta, but nothing more, to the effect that if for want of a stamp a contract is not merely inadmissible in evidence but altogether void by the law of the place where it is made, it cannot be enforced in England.¹ This, however, is nothing more than a particular application of the objectionable proposition that merely because the parties happen to conclude their contract in a certain place they are inexorably bound to observe the local formalities.

Though on grounds of convenience the parties may imbue their contract with formal validity by adopting the forms usual in the place where they conclude the transaction, it is now generally agreed that it is sufficient if they comply with the requirements of the proper law.² *Van Grutten v. Digby*,³ though it was not concerned with a mercantile contract, supports this view that the proper law is the alternative to the *lex loci contractus*. It was there held that a pre-marriage settlement contract made by an Englishwoman in France with English formalities was not invalidated by its failure to satisfy the French formalities. English law was the proper law of the contract.

Compliance
with the
proper law
is sufficient

(ii) *Essential requirements other than form.*

In some legal systems the mere consent of the parties suffices to create a binding obligation, in others something more is required. A comparison of Scots and English law with regard to consideration discloses one important example. In Scotland, apart from certain classes of contract required to be in writing,⁴ it is sufficient that the promisor should intend to bind himself and should express that intention in clear words.⁵ In England and other common-law countries a contract not under seal is void unless supported by consideration. Since requirements of this nature are essential to the *creation* of a valid contract, the question whether they are binding in a particular instance must be determined by some law independent of the volition of the parties. In the nature of things this can only be the putative

Putative
proper law
governs

Illustrated
by con-
sideration

¹ *Bristow v. Sequeville* (1850), 5 Ex. 275, 279, per Rolfe B.

² Dicey, op. cit., p. 624; Wolff, op. cit., pp. 448-9.

³ (1862), 31 Beav. 561.

⁴ See Gloag, *The Law of Contract* (2nd ed.), p. 162.

⁵ *Morton's Trustees v. Aged Christian Friend Soc.* (1902), 3 F. 75, 78.

proper law, i.e. the law of the country with which the contract, presuming it to be valid, will have the most substantial connexion. Thus in one case, a contract which was connected exclusively with Italy, except that the promisor's estate against which a remedy was sought was situated in England, was held to be enforceable, notwithstanding its lack of consideration.¹

Illustrated
by wager-
ing con-
tract

Another example is afforded by the English rule that a wagering transaction creates no obligation whatsoever, even though it may satisfy all the other requirements of a valid contract.² In some other countries, however, such a transaction is valid. Therefore, whether a wagering contract is enforceable in England depends upon whether it creates a valid obligation according to the law of the country with which it is most closely connected. Thus it is well settled that money won at play or lent for the purposes of play is recoverable by action in England, provided that it is recoverable in the country where it was lost or won.³ On the other hand, a wagering contract is not enforceable if its most substantial connexion is with England, though it may have close contact with a country where an action lies for the recovery of a lost bet. This is well illustrated by *Moulis v. Owen*.⁴

The defendant gave to the plaintiff in Algiers a cheque drawn on an English bank for money which he had borrowed from the plaintiff in order to play at baccarat in the local club. The loan and the cheque were valid by French law. The plaintiff sued in England on the cheque.

He failed for the simple reason that he sued on the cheque, not on the loan. The contract contained in the English cheque was governed by English law, as being the law of the country with which the contract had the most substantial connexion. As Kennedy L.J. said in a later case:

'In a transaction which culminated in the giving of a cheque payable in England, the question at issue ought to be regarded as governed by the law of England.'⁵

Incongruous though it may seem, one result of drawing the distinction between a security and the contract in respect of which it has been given is that a person, who receives an English cheque in payment of a gambling loan made in a country where

¹ *In re Bonacina*, [1912] 2 Ch. 394.

² Gaming Act, 1845, S. 1.

³ *Quarrier v. Colston* (1842), 1 Ph. 147; *King v. Kemp* (1863), 8 L.T. 255; *Saxby v. Fulton*, [1909] 2 K.B. 208.

⁴ [1907] 1 K.B. 746.

⁵ *Saxby v. Fulton*, [1909] 2 K.B. 208, 233.

gambling is lawful, may disregard the cheque and successfully maintain an action on the loan.¹ His possession of an unenforceable security does not preclude him from recovering the money on the alternative ground.

Another example of a requirement essential to the creation of a valid contract is that the type of obligation undertaken by the promisor should be legally effective. Legal systems do not always agree on this matter. Thus the general English rule, though perhaps it is in course of disintegration,² is that a promise made by *A* to *B* to confer a benefit on *C* is not enforceable by *C*, since there is no privity of contract between him and *A*. On the other hand, Scots law allows *C* to sustain an action against *A*, upon proof of a clear intention in the contracting parties to confer the benefit upon him.³ A conflict of this nature between two internal laws may raise a problem of the choice of law.

Illustrated
by doctrine
of privity
of contract

Suppose that *A & Co.*, an English firm carrying on business in England, promises *B*, one of its employees who is domiciled in England, that in certain eventualities it will pay £5,000 to *B*'s daughter, *C*. The money is to be paid to an English bank to the credit of *C*. At all material times *C* is resident and domiciled in Scotland and there is an express stipulation that the contract shall be governed by Scots law.⁴

This is an English contract in the objective sense, and it seems clear that its control by English law cannot be ousted by the express selection of Scots law. The question is whether a valid enforceable right has in fact been created in favour of *C*.⁵ Her claim goes to the validity of the contractual obligation.⁶ It is not determinable by any law in the world that the parties may have seen fit to choose, but by the law to which in the circumstances the contract naturally belongs. This conclusion is implicit in the decision of the Queen's Bench in *Scott v. Pilkington*.⁷

¹ *Société Anonyme des Grands Établissements du Touquet Paris-Plage v. Baumgart*, [1927] 96 L.J. (K.B.) 789; *aliter* in a purely domestic case, *Carlton Hall Club v. Laurence*, [1929] 2 K.B. 153.

² *Smith v. River Douglas Catchment Board*, [1949] 2 K.B. 500, 514-17.

³ Gloag, *The Law of Contract*, pp. 235 et seqq.

⁴ Founded on *Re Schebsman*, [1944] Ch. 83, a similar case, but containing no foreign element, in which the Court of Appeal held that the money was not recoverable at the suit of *C*.

⁵ *Cp. Brown v. Ford Motor Co.* (1931), 48 F (2d) 732 (Oklahoma).

⁶ *Lawrence Bank v. Rice* (1936), 82 F (2d) 22.

⁷ (1862), 2 B. & S. 11; *cp. Hartmann v. König* (1933), T.L.R. 114, where, however, there was no express choice of law, see, generally, Cheshire, *International Contracts*, pp. 68-69.

3. *Legality of purpose*

The proper law is not the exclusive arbiter of illegality

So far we have seen that with two slight exceptions¹ the proper law, i.e. the law of the country with which the contract has the most substantial connexion, and no other, determines the question whether an obligation has been validly and effectively created. In the particular matter of illegality, however, though it certainly affects the creation of contract, it is no longer possible to refer exclusively to the proper law. It may be necessary in addition to take account of other legal systems. It is obvious, for example, that no action will lie on a foreign contract which, though valid by its proper law, is regarded as morally reprehensible by the *lex fori*. Again, it has been said that a court ought not to enforce a contract, whatever its proper law may be, if its performance is illegal by the *lex loci solutionis*. We must consider, therefore, the different systems of law to which an issue of illegality must be referred. The answer may be given in five propositions, of which only the fourth is doubtful.

(i) Unenforceable if illegal by proper law
(ii) Unenforceable if contrary to public policy

First, it is axiomatic that a contract which is illegal by its proper law cannot be enforced in England.²

Secondly, no action lies in England upon a contract which infringes the distinctive public policy of English law. This doctrine and the danger that it may be pushed too far have already been sufficiently discussed.³

Interrelation of these two rules:

These two rules are undoubted, but the question of their interrelation deserves attention. It may be illustrated by the case of *Boissevain v. Weil*,⁴ where the facts were these:

In 1944, the respondent, a female British subject involuntarily resident in Monaco during the German occupation, borrowed 960,000 French francs from the appellant, a Dutch subject also involuntarily resident in the same place. She agreed to repay the loan in London at the rate of 160 francs to the pound as soon as possible after the war. She also gave to the appellant cheques to the value of £6,000, drawn on a London bank at which in fact she had no account, together

¹ Namely, that the fact of agreement is determinable by the *lex loci contractus* (*supra*, p. 226), and that compliance with the forms required by the *lex loci contractus* renders the contract formally valid; *supra*, p. 228.

² *Heriz v. Riera* (1840), 11 Sim. 318; *Kahler v. Midland Bank Ltd.*, [1950] A.C. 24, but *quaere* whether the proper law was correctly ascertained, see 3 *I.L.Q.R.* 255, 13 *M.L.R.* 206; *Zivnostenska Banka National Corp. v. Frankman*, [1950] A.C. 57; *supra*, pp. 148–50.

³ *Supra*, pp. 150 et seqq.

⁴ [1949] 1 K.B. 482 (C.A.), aff. [1950] A.C. 327.

with a letter to the manager requesting him to honour them as soon as it was lawful to do so.

At the time of the transaction, a Defence Regulation, made under the powers conferred by the Emergency Powers (Defence) Act, 1939, was in force, which provided that without Treasury permission no person other than an authorized dealer should buy or borrow any foreign currency. The Act of 1939 provided that defence regulations made under its provisions should apply *inter alia* to all British subjects with certain exceptions inapplicable to the respondent.¹

Both the Court of Appeal and the House of Lords agreed that the loan was irrecoverable, but their reasons were divergent.

In the Court of Appeal Tucker L.J. proceeded on the ground that the statutory order was intended to have extra-territorial effect and that the defendant herself and the transaction into which she had entered came directly within its ambit. Denning L.J., however, dismissed the action on the ground that English law was the proper law of the contract in the sense that it was 'most essentially connected with' England and that its illegality by that law was a fatal bar to the appellant's right of recovery. In his view a statute has extra-territorial effect only when the proper law is English, so that if for instance, while the regulation was in force, a British subject had borrowed dollars in New York and had promised to repay the loan there in dollars, the validity of the contract would have been unaffected by the English legislation. Nevertheless, the learned Lord Justice agreed that an action brought in England on the loan could have been met with the defence of public policy, for 'the validity of a contract is one thing and its enforcement another'.²

On the other hand, Lord Radcliffe, whose opinion received the unqualified assent of the other Law Lords, stressed the imperative nature of the statutory regulation which made it an offence, subject to severe penalties, for a British subject to carry out certain currency transactions, and he declared that whether such an offence has been committed cannot depend upon whether the proper law is English or foreign. It is suggested with respect that this line of approach tends to distort the role of an imperative domestic rule in the sphere of private international law. It confuses the normal with the abnormal applica-

¹ Defence (Finance) Regulations, 1939, reg. as amended; Emergency Powers (Defence) Act, 1939, S. 3, sub-s. 1.

² [1949] 1 K.B. at p. 491.

tion of the English *lex fori*.¹ The normal principle is that a foreign right, validly acquired under its governing law, is enforceable by action in England, and that English domestic law is irrelevant. The abnormal principle is that the right will not be enforced if it comes into conflict with English public policy. But there is no such conflict merely because it is inconsistent with an imperative rule of English law, whether statutory or otherwise. Before repudiating the foreign right, the court must go further and must satisfy itself that the imperative rule is not one which merely affects persons individually, as for example a prohibition against marriage under a certain age, i.e. a rule of *ordre public interne*, but one designed to protect an interest regarded as essential to the social, moral or economic welfare of the community, in other words, a rule of *ordre public international*. Had the contract of loan in *Boissevain v. Weil* been governed by the law of Monaco and had been valid by that law, the action would no doubt have failed, but it would have failed not because the statutory order in unrestricted terms forbade the very act that had been done, but because its unqualified application was economically a matter of imperious necessity. One function of private international law no doubt is to define the circumstances in which the *lex causae* must stand excluded, but if every statute of an imperative nature is to be construed as affecting *ordre public international* the inevitable and pernicious result must be the unwarranted sacrifice of the normal rules for the choice of law.²

(iii) Illegality by *lex loci contractus* as such is immaterial

Thirdly, a contract which is valid by its proper law does not become unenforceable in England merely because it is illegal according to the *lex loci contractus*. Suggestions have been made that the mere place of contracting is decisive upon the question of illegality, but in so far as they are judicial they have been made in cases where the *lex loci* was also the proper law of the contract.³ On practical grounds the suggestion has nothing to commend it. 'If a letter, by which a contract between an Englishman in London and a Swiss firm in Lucerne is accepted, is posted in Milan where the making of the contract would be

¹ Niboyet, *Traité de Droit International Privé*, iii. 493, cited by Kahn-Freund, 39 *Transactions of the Grotius Society*, 64-65.

² Upon the danger of treating every imperative statute as a matter of *ordre public international* see especially Kahn-Freund, 39 *Transactions of the Grotius Society*, 39-69. Compare also, Wolff, op. cit., pp. 168 et seqq.

³ *Quarrier v. Colston*, (1842), 1 Ph. 147; *Saxby v. Fulton*, [1909] 2 K.B. 208; *Branley v. S.E. Ry. Co.* (1862), 12 C.B. (N.S.) 63; *The Torni*, [1932] P. 78,

unlawful, while nothing would be unlawful if the letter had been posted either in London or Lucerne', the suggested rule would render the contract unenforceable in England.¹ What is more important is that the suggestion is inconsistent with the decision of the Court of Appeal in *In re Missouri Steamship Company*,² where the facts were as follows:

A contract was made in Massachusetts between an American citizen and English shipowners by which the latter agreed to carry cattle from Boston to England in an English ship. There was a clause expressly exempting the shipowners from liability for the negligence of the master or crew. This stipulation, though valid by English law, was void in Massachusetts as being contrary to public policy. The cattle were lost owing to negligence and the shipowners were sued for damages.

It was held that the intention of the parties, apparent from the terms of the contract, was to submit themselves to English law, and that the clause removing liability for negligence was effective. In other words the contract was more substantially connected with England than with Massachusetts, and therefore the invalidity of the exemption clause in the latter country was irrelevant.³

Whether a fourth proposition, to the effect that a contract illegal by the *lex loci solutionis* but not by the proper law is unenforceable in England, represents sound doctrine is more than doubtful. It is true that no doubt has been expressed in certain judicial circles. Thus, in one case, Lord Wright described

(iv) *Quaero*, is illegality by *lex loci solutionis* necessarily fatal?

'the well-known proposition that an English court will not enforce

¹ 18 *B.Y.B.I.L.* (1937), 104. See also Wolff, *op. cit.*, pp. 343-4; Dicey, *op. cit.*, pp. 632-3.

² (1889), 42 Ch.D. 321; *Jones v. Oceanic Steam Navigation Co. Ltd.*, [1924] 2 K.B. 730.

³ It is true that the judges were a little mystifying in some of their statements, especially Lord Halsbury, when he said: 'Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all the world over, and no civilized country would be called on to enforce it'; p. 336. Does this mean that the views of the *lex loci contractus* upon the degree of obliquity attributable to an illegal contract determines its enforcement in England? The tendency of the judgments was to regard the stipulation which offended public policy as void, but not illegal, by Massachusetts law. Fry L.J., for instance (at p. 342), described a contract in restraint of trade as void, not illegal, at common law. Is it not more accurate to describe it as illegal and therefore void? The mere fact that the contract is not void *in toto* does not remove the taint of illegality from the restraint itself; see Cheshire and Fifoot, *The Law of Contract* (4th ed.), pp. 273, 320.

a contract where performance of that contract is forbidden by the law of the place where it must be performed'

as too firmly established to require any further discussion.¹ It has, however, been convincingly shown that to attribute this unqualified effect to the *lex loci solutionis* is contrary to doctrine, since it may involve an unjustifiable disregard of the proper law if the contract is governed by a foreign legal system.² This may be clarified by a hypothetical example of a contract governed by German law.

A German shipowner, by a contract made in Hamburg, agrees with a German merchant to carry a cargo of jute in a German ship from Calcutta to Barcelona at a freight fixed in marks but payable in Barcelona. At the time when payment falls due the Spanish Government has issued a decree ordaining that freight on jute shall not exceed a sum which is considerably lower than the contractual rate.

If an action is brought in England to recover freight at the contractual rate, will it be a decisive argument against the claim that payment of the agreed amount has been rendered illegal by Spanish law? The argument is unacceptable, for 'we have to look to the governing law, none other, to ascertain whether any obstacle laid in the path of performance, frees the debtor from his duty of specific performance, if any, and from damages'.³ English internal law is not the proper law of the contract. Its only connexion with the case is that it is the *lex fori*, and in this capacity it is no part of its function to oust the German proper law and to dictate to it what the consequences of the illegality shall be. The effect of illegality varies greatly in different legal systems,⁴ and there is no justification for imposing the particular English view on foreign contractors merely because the action is brought in England. According to one writer, for instance, German law would probably allow recovery of the agreed sum in the case of our hypothetical contract, since it would take the view that owing to the supervening Spanish legislation the place of payment was no longer Barcelona, but Hamburg.⁵ Again, different legal systems have different views as to what constitutes the place of performance.

¹ *Rex v. International Trustee*, [1937] A.C. 500, 519. To the same effect, Lord Normand in *Kahler v. Midland Bank*, [1950] A.C. 24, 36.

² 18 *B.Y.B.I.L.* 107-13 (Dr. Mann); Wolff, op. cit., pp. 444-5; Falconbridge, *Conflict of Laws* (2nd ed.), pp. 391-4; Rabel, op. cit., ii. 535-9.

³ Rabel, op. cit., ii. 537.

⁴ Wolff, op. cit., p. 445.

⁵ Dr. Mann, 18 *B.Y.B.I.L.* 111.

If, for instance, by a contract subject to French law, the defendant resident in France agrees to pay money to the plaintiff resident in Switzerland, the place of performance is Switzerland according to English and Swiss law, but France according to French law.¹ If the payment were later made illegal by Swiss law, would the court be furthering the ends of justice by disregarding the French view?

The proposition that a contract which is illegal at the place of performance is necessarily unenforceable in England is not supported by the actual decisions generally cited in its favour.² Some of them merely apply the principle that a contract, subject to a foreign law, is not enforceable if it offends the English doctrine of public policy.³ Others, including *Ralli v. Compania Naviera Sota y Aznar*,⁴ which is the mainstay of those who advocate the proposition, have been concerned with cases where it was the proper law that rendered the contract illegal.⁵ The facts of that case were in general similar to those supposed in the hypothetical example given above, except for this vital difference that the proper law of the contract, which fixed a freight of £50 per ton, was English law. The court, therefore, was bound to apply and did in fact apply the internal law, not the private international law, of England. The familiar English cases dealing with impossibility of performance were cited and Scrutton L.J. summed up their effect upon the instant facts in the following words:

No decisive authority that illegality by *lex loci solutionis* is necessarily fatal

‘Where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that State.’⁶

The essential fact to realize is that no case has yet arisen requiring the court to consider the effect of illegality at the foreign place of performance upon a contract, the proper law of which is the law of still another foreign country. When it does arise, there is a danger that the frequent dicta attributing decisive effect to illegality by the *lex loci solutionis* will

¹ Wolff, *op. cit.*, p. 135.

² 18 B.Y.B.I.L. 109.

³ *Foster v. Driscoll*, [1929] 1 K.B. 470.

⁴ [1920] 2 K.B. 287.

⁵ *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589; *Kursell v. Timber Operators and Contractors Ltd.*, [1927] 1 K.B. 298; *De Beeche v. South American Stores*, [1935] A.C. 148; *St. Pierre v. South American Stores (Guth and Chaves) Ltd.*, [1937] 3 All E.R. 349.

⁶ [1902] 2 K.B. at p. 304.

prevail, despite the indifference that they display to general principles.¹

(v) *Illegality by lex patriae or lex domicilii immaterial* The last and rather obvious proposition is that a contract is not unenforceable in England merely because performance is illegal by the law of the country in which the promisor carries on his business or to which he belongs by nationality or domicile, provided that the contract is not subject in other respects to the law of that country.²

III. INTERPRETATION

Doctrine of autonomy applies The stage has now been reached where a contract, formally and essentially valid and made between parties of full capacity, has been created. In the further matters that may require the intervention of the court there is, speaking generally, no reason in principle why the parties should not be free to select the governing law. This is certainly true in the case of interpretation.

Law applicable depends solely upon intention, express or implicit, of the parties The province of interpretation is to discover the true intent and meaning of the parties as expressed by the language of the contract.³ This is a question of fact.⁴ Nevertheless, a question of choice of law may arise, for if an expression is ambiguous and if it bears different meanings in different legal systems, its interpretation must be determined by reference to one only of these systems. Since the sole object is to attribute to the expression the meaning that the parties intended it to bear, the manifest solution in this event is to apply the law that they had in mind when they made their contract. If they have expressly stated that the contract is to be interpreted, construed or considered according to the law of a particular country, *cadit quaestio*. The meaning attributed to the expression by that law will prevail.⁵

¹ Thus the editors of the 6th ed. of Dicey have retained the exception to Rule 141 (p. 637), which denies enforceability to a contract so far as the performance of it is unlawful by the *lex loci solutionis*, because they feel it 'not to be convenient to alter the wording of a Rule which has been judicially approved on so many occasions'; p. 639, note 83.

² *Kleinwort Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft*, [1939] 2 K.B. 678; *British Nylon Spinners Ltd. v. Imperial Chemical Industries Ltd.*, [1955] Ch. 37; see 18 M.L.R. 65-70.

³ *Berry v. Berry* (1616), 3 Bulst. 62, per Coke L.J.

⁴ *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79, 85, per Lindley L.J.

⁵ *Pena Copper Mines Ltd. v. Rio Tinto Co. Ltd.* (1911), 105 L.T. 846; *Indian & Industrial Trust Ltd. v. Borax Consolidated Ltd.*, [1920] 1 K.B. 529; *St. Pierre v. South American Stores*, [1937] 3 All E.R. 349, 354.

In the absence of an express choice, their intention is a matter of inference. The legal background against which the expression was adopted must be inferred from the language of the contract and its attendant circumstances. There is, of course, a strong presumption in favour of the proper law. But an intention that the parties had in mind some other law may well be the correct inference. If, for instance, they have used a technical expression which bears a definite meaning in country *X*, but is unintelligible to the proper law, it is only reasonable to infer that their minds were directed to the law of *X*.¹ Again, certain *prima facie* rules have been established which may facilitate the inquiry. To take one example, a contract of insurance is primarily to be interpreted according to the *lex domicilii* of the insurance company, i.e. the law of the country in which it is incorporated.²

It is important in the present connexion, however, to distinguish two entirely different questions, namely, What meaning is to be attributed to a certain expression? and Can effect be given to that meaning? They are questions that are not necessarily governed by the same law. As Lindley L.J. said:

Meaning
of words
distinguish-
ed from their
legal
effect

“The expression “construction” as applied to a document, at all events as used by English lawyers, includes two things: first, the meaning of the words; and secondly their legal effect or the effect which is to be given to them. The meaning of the words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law.”³

What legal effect, if any, can be allowed to the meaning intended by the parties is a matter of substance determinable by the proper law. In the case, for instance, of a contract for the transfer of a chattel as security for a loan, the parties may clearly intend that there shall be no right of redemption after a certain fixed period, but it is for the *lex situs* of the chattel to decide whether the right can be restricted in this manner.

¹ The point arose but did not require decision in *Rowett, Leakey & Co. v. Scottish Provident Institution*, [1927] 1 Ch. 55, where a contract of insurance contained the expression ‘*bona fide* onerous holder’. The expression is familiar to Scots law.

² *Equitable Trust Co. v. Henderson* (1930), 47 T.L.R. 90.

³ *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79, 85.

IV. THE SUBSTANCE OF THE OBLIGATION

The task now is to identify the law that governs what is sometimes called the 'essential' or the 'intrinsic' validity of the contract, or its 'effects' or what may equally well be called the 'substance of the obligation'. The stage has now been reached in our inquiry at which the obligation has begun to operate. The contract is in course of performance. Its effects are being felt. A variety of problems may require reference to a particular law, such, for instance, as the following:

Whether a carrier is liable for the loss of¹ or injury to² the goods or for delay in their delivery.³

Whether the defendant has a good excuse for the non-performance of the contract.⁴

Whether the master of a ship is justified in selling the cargo at a port of distress.⁵

Whether the loss of goods in transit is due to the 'perils' excepted by the bill of lading⁶ or to the 'perils of the sea'.⁷

Whether an action lies for breach of promise of marriage.⁸

Whether an agent has exceeded his authority.⁹

Whether a contract is voidable for misrepresentation.¹⁰

Whether insurers under a fidelity guarantee are entitled to contribution from co-insurers.¹¹

Whether currency restrictions prevent the payment of the amount due under the contract.¹²

Whether an insurer is liable to pay the sum assured.¹³

Whether a stipulation exempting the promisor from liability in certain events is effective.¹⁴

Whether a contract confers rights on third parties.¹⁵

¹ *P. & O. Steam Navigation Co. v. Shund* (1865), 3 Moo. P.C. (N.S.) 273.

² *De Cleremont v. Brasch* (1885), 1 T.L.R. 370.

³ *The San Roman* (1872), L.R. 3 A. & E. 583.

⁴ *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589.

⁵ *The August*, [1891] P. 328; *The Industrie*, [1894] P. 58.

⁶ *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521. ⁷ *Greer v. Poole* (1880), 5 Q.B.D. 272.

⁸ *Hansen v. Dixon* (1906), 23 T.L.R. 56; *Kremezi v. Ridgeway*, [1949] 1 All E.R. 662.

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¹⁰ *British Controlled Oilfields v. Stagg* (1921), 66 Sol. Jo. (W.R.) 18.

¹¹ *American Surety Co. of New York v. Wrightson* (1910), 103 L.T. 663.

¹² *Kahler v. Midland Bank*, [1950] A.C. 24; *Zivnostenska Banka National Corporation v. Frankman*, [1950] A.C. 57.

¹³ *Spurrier v. La Cloche*, [1902] A.C. 446.

¹⁴ *Re Missouri Steamship Co.* (1889), 42 Ch.D. 321; *Vita Food Products Inc. v. Unus Shipping Co. Ltd.*, [1939] A.C. 277.

¹⁵ *Hartmann v. König* (1933) 50 T.L.R. 114.

Whether a stipulation in a contract for the grant of a mortgage is void as being a clog on the equity of redemption.¹

Whether an agreement in restraint of trade is enforceable.²

There is no room for doubt that all these matters and others of a like nature are governed exclusively by the proper law of the contract, subject to what has already been said as to illegality.³ Despite the invariable reference by the judges to the intention of the parties, the authorities cited above show that normally this law is the law of the country with which the contract has the most substantial connexion. The only conceivable controversy is whether this can be displaced by the express selection of a law with which the contract has an insignificant connexion or no connexion at all. As we have said, once a contract has been validly created according to the law to which objectively it belongs, there is no theoretical, and no great practical, objection to allowing full scope to the free will of the parties. In the case of a contract of carriage, governed as to its creation by English law, the question, for instance, whether the goods have been lost owing to the perils of the sea may without disturbing doctrine be determined according to Dutch law if the parties have expressly agreed to refer matters affecting the substance of the obligation to that law. Putting aside the arbitration cases,⁴ it would seem, indeed, that where the law expressly chosen by the parties has been accepted by the courts as entitled to govern the substance of the obligation, there has, with one exception,⁵ always been some factual connexion, and generally a substantial connexion, between the contract and the country of the chosen law. Nevertheless, the prevailing opinion is that no such connexion is necessary, except where the issue relates to the creation of a binding obligation.⁶

Proper law governs substance of obligation

In theory parties have unrestricted choice of proper law

When the proper law and the *lex loci solutionis* are not identical, a fact deserving emphasis is that performance of the contract is a matter of substance to be governed by the proper law. At first sight the supposition may seem reasonable that questions affecting performance are subject to the law of the

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¹ *British South Africa Co. v. De Beers Consolidated Mines*, [1912] A.C. 52.

² *South African Breweries Ltd. v. King*, [1899] 2 Ch. 173; aff. (1900) 1 Ch. 273.

³ *Supra*, p. 232.

⁴ *Supra*, p. 215.

⁵ *British Controlled Oilfields v. Stagg* (1921), 66 Sol. Jo. (W.R.) 18.

⁶ *Supra*, p. 216. Of course, the right of incorporating a foreign law as one of the terms of the contract is exercisable without restriction so far as the substance of the obligation is concerned; *supra*, pp. 220-1.

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place where performance is due. There are, indeed, certain judicial statements which give this impression. Thus, in *Chatenay v. Brazilian Submarine Telegraph Company*,¹ Lord Esher said:

'But if [the contract] is to be carried out partly in another country than that in which it is made, that part which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country.'

This is a little misleading. Different aspects of a contract may no doubt be governed by different laws. A question of interpretation, for instance, may be determinable by a different law from that which governs the creation of the contract, but once it is clear that a particular law governs substance it must govern in that respect exclusively. That performance is a matter of substance admits of no doubt. Questions affecting the rights and liabilities of the parties under a perfectly constituted contract relate to substance. Among these are included the nature and extent of the promisor's liability in the event of his failure to perform his obligation and the grounds upon which his non-performance is excusable.² To regard these issues as falling within a separate category reserved exclusively for the *lex loci solutionis* might seriously affect the contractual rights to which the promisee is entitled under the proper law.

*Jacobs v.
Crédit
Lyonnais*

This has now been recognized by English judges. After some hesitation,³ it has been affirmed that the *lex loci solutionis* cannot be allowed to alter the substance of the obligation as fixed by the proper law, i.e. it cannot be allowed to qualify the rights and liabilities of the parties.⁴ It is no part of its

¹ [1891] 1 Q.B. 79, 83; see also *Rex v. International Trustee*, [1937] A.C. 500, at p. 574, *per* Lord Roche; and *Hardy (M.W.) & Co. Ltd. v. A. V. Pound & Co. Ltd.*, [1955] 1 Q.B. 499, where at p. 512 Lord Goddard C.J. said: 'I agree with McNair J. that the proper law of the contract is English, but that its performance must be regulated by the law of Portugal'; see also at p. 510 *per* Singleton L.J. This statement seems to have been *obiter*, for the court apparently held that it was English law which cast upon the sellers, not upon the buyers, the duty of obtaining an export licence in Portugal, the place of shipment; for a criticism of the decision see 18 *M.L.R.* 405-8.

² *Louis-Dreyfus v. Paterson Steamships Ltd.* (1930), 43 F. (2d) 824 (U.S.A.); Cheatham, *Cases on the Conflict of Laws* (3rd ed.), p. 500, at p. 501.

³ *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122, 151. On the matter generally see 6 *Vanderbilt Law Review*, 505 et seqq. (J. H. C. Morris).

⁴ *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society*, [1938] A.C. 224, at pp. 240-1.

function 'to change the substantive or essential conditions of the contract'.¹ Thus it was held in *Jacobs v. Crédit Lyonnais*² that if a seller, by a contract subject to English law, has agreed to deliver goods in Algiers, he cannot escape liability for non-performance by pleading an excuse that is sufficient by French law but insufficient by English law.

'The mere fact', said Bowen L.J., 'that a contract of this description—made in England between English resident houses, and under which payment is to be made in England upon delivery of goods from up country in an Algerian port—is partly to be performed in Algeria, does not put an end to the inference that the contract remains an English contract between English merchants, to be construed according to English law and with all the incidents which English law attaches to the non-performance of such contract.'³

An even stronger example of the control of the proper law over performance of the obligation is afforded by *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society*,⁴ where the facts were as follows: The Mount Albert case

A New Zealand borough council raised a loan from a Victorian company and issued debentures in 1926 repayable in Victoria and bearing interest at the rate of £5. 13s. 9d. *per centum per annum* also payable in Victoria.

A Victorian statute of 1931, designed to rectify the financial instability of that period by calling for a common sacrifice from all, provided that interest due under existing mortgages should be reduced at a certain rate for a period of three years.

The Privy Council expressed its strong opinion that this statute, even if it extended to debentures, which was not the case, did not affect the obligation of the borrowers to pay interest at the agreed rate of £5. 13s. 9d. The amount payable was a matter of obligation that was subject exclusively to the law of New Zealand as being the proper law of the contract. There could not be one proper law to govern the obligation and another to govern the extent to which it was dischargeable.⁵

The decision of the Court of Appeal in *Chatenay v. Brazilian Submarine Telegraph Co.*⁶—the case in which Lord Esher made Position illustrated by agency contract

¹ *Bonython v. Commonwealth of Australia*, [1951] A.C. 202, 219, and other cases cited *infra*, pp. 246–9. ² (1884), 12 Q.B.D. 589.

³ *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. at p. 603.

⁴ [1938] A.C. 224.

⁵ The Victorian statute did not render payment of interest at the stipulated rate illegal (p. 241), and therefore the alleged rule that a contract is unenforceable if performance is illegal in the place of performance (*supra*, pp. 235–8) was not relevant. ⁶ [1891] 1 Q.B. 79.

the statement quoted above¹—does not endorse the view that all questions affecting the performance of a contractual obligation fall to be determined by the *lex loci solutionis*. It merely illustrates the rule that the position of a principal with regard to third parties with whom the agent has contracted on his behalf is determined by the proper law of the contract made by the agent.

Suppose that by a contract, the proper law of which is the law of country *X*, *P* appoints *A* his agent with authority to act in some other country.

Two entirely different questions may arise.

Questions arising between principal and agent First, questions concerning the mutual obligations of *P* and *A* as, for instance, the extent of *A*'s authority and his rate of commission. These are governed by the law of *X* as being the proper law of the contract by which the agency has been created.²

Questions arising between principal and third parties Secondly, questions arising out of a contract made by *A* in some country other than *X*, as, for example, the effect of a payment made by the third party to *A* or the liability of *P* to the third party if in fact *A* has exceeded his authority. The law applicable to these questions is traditionally described as the law of the country where the act of the agent is performed, i.e. where he exercises his authority.³

'If I, residing in England,' said Lord Lyndhurst, 'send down my agent to Scotland and he makes contracts for me there, it is the same as if I myself went there and made them.'⁴

If, for instance, the agent is clothed with a general authority to act abroad, the principal will be bound by a contract which, in the view of the law of the country where it is made, is within the ostensible authority of that particular agent.⁵ Again, whether an undisclosed principal can sue or be sued upon a contract with a third party is determined by the law of the place where the agent acts.⁶ The same general rules apply to a

¹ *Supra*, p. 242.

² *Maspons v. Mildred* (1882), 9 Q.B.D. 530; aff. 8 App. Cas. 874.

³ *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79; *Sinfra Aktiengesellschaft v. Sinfra*, [1939] 2 All E.R. 675.

⁴ *Pattison v. Mills* (1828), 1 Dow. & Cl. 343, 363.

⁵ It is submitted that the decision of the Court of Appeal in *Ruby S.S. Co. v. Commercial Union Assurance Co.*, [1933] 39 Com. Cas. 48, is inconsistent with principle and authority, see Dicey, pp. 714-15; Falconbridge, op. cit., p. 437.

⁶ *Maspons v. Mildred* (1882), 9 Q.B.D. 530; 8 App. Cas. 874.

contract made by a partner in a country other than that in which the partnership has its place of business.

But the emphasis upon the place where the agent acts is at bottom only a loose method of saying that questions arising between the principal and third parties are governed by the proper law of the contract made by the agent in pursuance of his authority. In general, it is perfectly accurate to identify the proper law with the law of the place where the agent acts. His contract is made there and is usually performable there. Nevertheless, complete accuracy requires us to say that the position between the principal and third parties is regulated by the law of the country with which the contract made by the agent is most substantially connected. This appears to have been the meaning of Lord Esher, though he preferred to base the rule upon the presumed intention of the principal and agent. What he said in effect was that if in country *X* an authority exercisable in country *Y* was conferred by the principal upon his agent, the parties must have intended that its exercise should be subject to the law of *Y*.¹

Proper law
of agent's
contract
governs

No great harm is done, however, by emphasizing the significance of the place where an agent acts, as long as we do not read into it any suggestion that the *lex loci solutionis* as such governs questions affecting the performance of a contract. That law, where it does not represent the proper law, has only a minor part to play. Its function is limited to regulating the mere incidents or mode of performance.² Under the mode of performance fall such questions as the money of payment, i.e. the currency in which a debt is dischargeable,³ a moratorium imposed in the country of performance,⁴ the date at which lay days begin to run,⁵ the hours during which delivery may be tendered,⁶ and the meaning to be attributed to the word 'alongside' in a stipulation providing that the cargo is 'to be taken from alongside the steamer'.⁷

Mode of
perform-
ance alone
governed
by *lex loci*
solutionis

¹ *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79, 82-83.

² *Auckland Corporation v. Alliance Assurance Co.*, [1937] A.C. 587, 606; *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society*, [1938] A.C. 224, 240.

³ *Ibid.*, [1938] A.C. at p. 241; *infra*, p. 256.

⁴ *Rouquette v. Overmann* (1875), L.R. 10 Q.B. 525. But a moratorium law which is more drastic than the mere postponement of the date for payment is a matter for the proper law, *In re Helbert Wagg & Co. Ltd.*, [1956] 2 Ch. 323.

⁵ *Norden Steam Co. v. Dempsey* (1876), 1 C.P.D. 654.

⁶ Dicey, p. 601.

⁷ 18 *B.Y.B.I.L.* citing *The Turid*, [1922] 1 A.C. 397.

V. DISCHARGE

Proper law
governs
discharge

There is no doubt, either on principle or authority, that discharge affects the substance of the obligation and that it is governed by the proper law of the contract.¹ This law determines, for instance, whether a contract is discharged by bankruptcy,² by the outbreak of war,³ or by subsequent impossibility;⁴ whether payment made by a garnishee is a complete release of his liability;⁵ and whether a surety is discharged if the creditor accepts a part-payment from the principal debtor.⁶ In the case of discharge by substituted agreement, however, it may conceivably be necessary to refer in the first place to another law. The valid creation of the agreement itself must first be determined by its own proper law; then its effect upon the original obligation which it is designed to replace must be determined by the proper law of that obligation.

Exceptional
case of
Statutes of
Limitation

It must be noticed that in England the extinguishment of an obligation under Statutes of Limitation is not regarded as a matter falling within the province of the proper law. It is referred to the *lex fori*, for in the English view the true effect of such statutes is that after the lapse of a defined period they deny the procedure of the courts to litigants.⁷

Interna-
tional
money
obligations

The discharge of international money obligations deserves more detailed examination, not only because of its importance in the commercial world of today, but also because it is a striking illustration of the fundamental principle of the choice of law that matters affecting the substance of the obligation to pay are governed by the proper law, but that the actual mode of payment is governed by the law of the place of payment.⁸

Meaning
of 'money
of account'

The first point to observe is that the amount of money due, since it has been fixed by the contract itself, affects the substance of the obligation. It cannot be varied by some different rule obtaining in the country of payment,⁹ for that would be to alter the contractual obligation.¹⁰ The amount, however,

¹ *Gibbs v. Société Industrielle et Commerciale des Métaux* (1890), 25 Q.B.D. 399. ² *Ibid.* ³ *In re Anglo-Austrian Bank*, [1920] 1 Ch. 69.

⁴ *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589.

⁵ *Swiss Bank Corporation v. Boehmische Industrial Bank*, [1923] 1 K.B. 673.

⁶ *Cp. Bellingham v. Freer* (1837), 1 Moo. P.C. 333. ⁷ *Infra*, pp. 653-7.

⁸ For fuller accounts see Mann, *The Legal Aspect of Money* (2nd ed.), pp. 182 et seqq.; Nussbaum, *Money in the Law*; Dicey, pp. 718-53; Wolff, pp. 460-76; *6 Vanderbilt Law Review*, 512-26 (J. H. C. Morris).

⁹ *Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society*, [1938] A.C. 224; *supra*, p. 243.

¹⁰ Lord Wright, *Legal Essays and Addresses*, p. 170.

though clearly expressed in terms, may depend upon the currency that the parties had in mind when they concluded their bargain. If, for instance, an English seller has agreed to sell goods to an Australian buyer for £500, the amount of cash due to the seller, with the Australian pound at a discount of 25 per cent. compared with the English pound, will depend upon whether the contractual currency is English or Australian. It is, therefore, essential in a case of doubt to ascertain the currency in which the parties intended the obligation of the debtor to be measured. In technical language the inquiry is directed to ascertaining the 'money of account',¹ or as it may equally well be called the 'money of measurement'² or 'contractual money'.³

This is a matter of intention to be deduced from the terms of the contract and its surrounding circumstances. It is also a matter affecting the substance of the obligation and therefore, if there are no counter-indications, it must be considered in the light of the canons of construction and the presumptive rules recognized by the proper law of the transaction.⁴ Presuming that there has been no express designation of the monetary system within the framework of which it was intended that the debtor's obligation should be measured, the question becomes a matter of implication.⁵ No one factor is necessarily decisive. Thus, in one case a reference to pounds *sterling* may show that English pounds were intended,⁶ but in another it may be impossible to infer such an intention.⁷ One important factor is that a particular place has been chosen by the parties for payment of the debt, but again this may or may not be decisive. This may be shown by contrasting two leading cases.

Money of account determined according to the proper law

In *Adelaide Electric Supply Co. v. Prudential Assurance Co.*:⁸

An English company, carrying on business in Australia, issued preference shares the dividends on which were payable in England.

¹ Mann, *The Legal Aspects of Money*, p. 158, adopting Lord Tomlin in *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122, 146.

² Dicey, p. 735.

³ Nussbaum, *Money in the Law*.

⁴ Mann, *op. cit.*, pp. 186 et seqq.

⁵ *Bonython v. Commonwealth of Australia*, [1951] A.C. 202, 221.

⁶ *De Bueger v. Ballantyne & Co.*, [1938] A.C. 452.

⁷ *Bonython v. Commonwealth of Australia*, *supra*.

⁸ [1934] A.C. 122, as explained in *Payne v. Deputy Federal Commission for Taxation*, [1936] A.C. 497, 509, and *Bonython v. Commonwealth of Australia*, *supra*, at pp. 220-1. For criticisms see Mann, *op. cit.*, pp. 195-202; 6 *Vanderbilt Law Review*, 516-18.

Six years later, by resolutions binding on the shareholders, new articles of association were framed providing that the management of the company should be transferred to Australia and that all dividends should be paid in and from that country.

The House of Lords construed the contract between the company and the shareholders, as varied by the amending articles, to mean that the newly agreed place of payment 'determined the substance of the obligation, i.e. the currency by which the obligation was to be measured'.¹ Therefore the obligation to pay was discharged by a payment in Australian currency, notwithstanding that owing to the depreciation of the Australian pound this meant a loss to a shareholder in England. The decision, however, did not lay down any general rule that if a particular place is chosen for payment the *lex loci solutionis* must determine the measure of the obligation.

This has been made clear by the Privy Council in *Bonython v. Commonwealth of Australia*,² where the facts were these:

In 1895 the Queensland Government issued debentures in 'pounds sterling', which provided that the principal sums should be payable on January 1st, 1945, either in Brisbane, Sydney, Melbourne or London at the option of the holders. Certain holders of Commonwealth Stock, into which the debentures had later been converted on the original terms, demanded either to be paid in London the nominal amount of their stock in English currency or to be paid in Australia the equivalent in Australian currency of such amounts of English currency.

The Privy Council refused the demand. Had payment been due in London only, that would indeed have been 'an important factor', but London was only one of four possible places. The substance of the obligation was the same in every case and it could not be varied between the debenture-holders merely because some elected to be paid in London, others in Australia. The true inquiry was to identify the monetary system that was in the minds of the parties at the time of the issue in 1895 or, to put it in another way, to identify the proper law by which the substance of the obligation, including the determination of the money of account, was governed. There was 'overwhelming evidence that it was to the law of Queensland that the parties looked for the determination of their rights'.³

¹ *Bonython v. Commonwealth of Australia*, [1951] A.C. 202, 220. *National Bank of Australasia Ltd. v. Scottish Union & National Insurance Co. Ltd.*, [1952] A.C. 493; *National Mutual Life Association of Australasia Ltd., v. A.-G. for New Zealand*, [1956] A.C. 369.

² *Supra*.

³ *Ibid.*, at p. 221.

The debentures were issued on the authority of a Queensland Act and were secured on the public revenues of the Colony. The natural inference was that the Queensland Government would treat in the terms of its own currency.

‘The Government of a self-governing country, using the terms appropriate to its own monetary system, must be presumed to refer to that system whether or not those terms are apt to refer to another system also. It may be possible to displace that presumption, but, unless it is displaced it prevails, and, if it prevails, then it follows that the obligation to pay will be satisfied by payment of whatever currency is by the law of Queensland valid tender for the discharge of the nominal amount of the debt.’¹

Once the money of account is established, once it is clear for instance that £700 English pounds are payable, the principle of nominalism applies and the debtor discharges his obligation by the tender of pounds to the nominal value of seven hundred. What represents the amount must be determined by English law, for the nominal value of any unit of account, whether pound, dollar or franc, must of necessity be fixed by the *lex pecuniae*, i.e. the law of the country in which the unit has been issued. Therefore a debtor is discharged by the payment of whatever chattels, whether coins, notes or anything else, represent, at the time when performance is due, legal tender and legal currency in the country whose money has been specified.² The fortunes, good or bad, that have befallen the currency in the interval between the making of the contract and the time of performance are irrelevant.

Nominal
value of
money of
account
represents
amount
due

It follows that if the money of account has depreciated in value the creditor will receive less in real value than the amount fixed by the contract. A striking example of this is afforded by *In re Chesterman's Trusts*,³ where the facts were these:

Deprecia-
tion of
money of
account
immaterial

By a deed executed in 1911 and expressly made subject to English law, a German national mortgaged his share under an English trust fund to a Dutch bank as security for a loan of 31,000 marks. At that date the lender would have been entitled by German law to insist upon repayment in gold marks, but the law was altered after the outbreak of the 1914 War by a statute which provided that an obligation to pay a specified sum in marks should be dischargeable by the delivery of paper

¹ *Bonython v. Commonwealth of Australia*, [1951] A.C. 202, at p. 222.

² *Pymont Ltd. v. Schott*, [1939] A.C. 145; *Marrache v. Ashton*, [1943] A.C.

311.

³ [1923] 2 Ch. 466. See also *Ottoman Bank of Nicosia v. Chakarian*, [1938] A.C. 260.

marks to the same nominal amount. The intrinsic value of 31,000 paper marks in 1923, the date of repayment, was very greatly less than the value of 31,000 gold marks at the time of the loan.¹

It was held that repayment in the depreciated paper currency discharged the obligation of the debtor. The contract to repay the money of account, i.e. a given number of German marks, was a contract to repay whatever might be legal tender at the time of repayment, not at the time of the contract, in the country where the mark circulated.

System of
revaloriza-
tion obtains
in some
countries

To meet such cases of currency depreciation, certain countries have adopted a system of revalorization under which a debtor must in certain circumstances pay to the creditor a greater amount than that fixed by the original transaction.² Thus, after the German reichsmark had been substituted for the mark the German courts, taking advantage of article 242 of the Code which runs,

'the debtor is bound to effect the performance of his obligation according to the requirements of good faith',

would order a debtor owing a sum in the old currency to pay a sum in reichsmarks which, having regard to all the circumstances of the case, appeared to be just.³

Revaloriza-
tion a
matter for
the proper
law

Revalorizing provisions of this nature are not part of the currency law of the country in question.⁴ Their object is to rectify or amend the obligation itself. The *lex pecuniae* cannot alter the *quantum* of the obligation. The result is that the question whether a debt is to be revalorized is determinable solely by the proper law of the contract. This was made clear by the Court of Appeal in *Anderson v. Equitable Assurance Society of the United States*.⁵

By a contract subject to English law H. took out a policy in 1887 with an American insurance company under which 60,000 marks became payable on his death to his widow. The premiums and the sum assured were expressed in German marks. The premiums due had all been paid by 1907. Upon his death in 1922, his widow claimed that the debt must be revalorized in accordance with German law.

¹ Apparently the lender would receive about £1. 15s. instead of £1,500.

² Mann, op. cit., pp. 74 et seqq.; Wolff, pp. 465-6.

³ *Re Schnapper*, [1936] 1 All E.R. 322, 325. In addition, different revalorization rates were specifically fixed for various classes of monetary obligations; Wolff, p. 466.

⁴ Mann, op. cit., pp. 238 et seqq.; Wolff, p. 466.

⁵ (1926), 134 L.T. 557.

The claim was disallowed. It was necessary to refer to German law, *qua* the *lex pecuniae*, in order to ascertain what German currency in 1922 represented 60,000 marks under the old currency. The reference stopped, however, at that point. It was not the function of the *lex pecuniae* to determine whether more than the normal amount of currency should be paid in discharge of the obligation. That was a question for English law, and since English law has no system of revalorization the widow was entitled to no more than the sterling equivalent in 1922 of 60,000 marks. In the words of Atkin L.J.:¹

'It is the debt that is valorised and not the currency; and if that is so it is obvious that the German law cannot affect the operation of the rule of English law which is laid down in *Re Chesterman's Trusts*.'²

In the later case of *In re Schnapper*,³ Clauson J. treated the promise of the debtor as governed by German law⁴ and in consequence applied the principle of revalorization.

In these days of monetary instability, which began after the War of 1914, contracting parties frequently adopt a gold clause in an attempt to protect the creditor against a depreciation of currency.

Depreciation of currency avoidable by a gold clause

A gold clause may take either of two forms.

(a) A gold-coin clause, which is an agreement that a certain sum of money shall be paid in gold coins. This may not be an effective protection to the creditor, for it will be impossible for him to demand gold if a system of inconvertible paper money has been adopted in the country where performance is due.

Gold-coin clause

(b) A gold-value clause. This is an agreement, not to pay in gold coin or to deliver gold in specie, but to pay at the due date a sum equal to the then value of the gold coin specified.⁵ For instance, it fixes the value of a loan at, say, £10,000, but provides that this shall be redeemed by the delivery of a quantity of paper or other money which would be equivalent to 10,000 gold coins of Great Britain of the standard weight and fineness existing at some specified date. Under such a provision the nominal amount of the loan is constant, but the amount of

Gold-value clause

¹ At p. 566.

² *Supra*, p. 249.

³ [1936] 1 All E.R. 322. See also *Kornatzki v. Oppenheimer*, [1937] 4 All E.R. 133.

⁴ For the ground upon which he did so see Mann, *The Legal Aspects of Money*, p. 242.

⁵ *New Brunswick Ry. Co. v. British and French Trust Corp.*, [1939] A.C. 1, at p. 39, *per* Lord Romer.

currency required for its repayment may vary. The clause specifies not a mode of payment, but a measure of liability.

Determina-
tion of the
proper law

The first task of a court which is required to consider an international contract containing a gold clause is to ascertain the proper law which governs the contract of loan. Whether the borrower is a sovereign State, a corporation or a private person, the proper law must be ascertained according to those rules and considerations that apply to a contract of any kind. The former judicial view, based upon the maxim that a sovereign is presumed to submit only to his own law, was that the proper law of a contract of loan negotiated by a State, whether in its own or in a foreign country, is necessarily the law of that State,¹ but it has now been held by the House of Lords that the sovereign nature of the borrower, though a factor of great weight, does not conclusively determine the governing law.² Two factors of especial importance are the place where the loan is issued and the currency in which it is repayable.

*Rex v. In-
ternational
Trustee*

A leading case on the subject is *Rex v. International Trustee*,³ where the facts were these:

In 1917 the British Government issued in America certain gold notes, convertible at the will of the holders into gold bonds, repayable at the option of holders either in New York or in London, and if in New York repayment to be made in gold coin of U.S.A. of the standard of weight and fineness existing on February 1st, 1917. The bonds were secured by a pledge agreement under which the borrowers deposited certain securities with an American company.

It was held, both by the court of first instance and by the Court of Appeal, that the contract between the British Government and a bond-holder was governed by English law, though presumably this finding was based solely upon the fact that one of the contracting powers was the Crown. The House of Lords came to the opposite conclusion. The circumstances attendant upon the issue of the loan demonstrated almost irresistibly that according to the presumed intention of the parties the contract was to be subject to the law of New York. The original notes

¹ *International Trustee for the Protection of Bondholders v. Rex*, [1936] 3 All E.R. 407, following dicta in *Smith v. Woguelin* (1869), L.R. 8 Eq. 198, 212-13, and *Goodwin v. Robarts* (1875), L.R. 10 Ex. 337, 494.

² *Rex v. International Trustee*, [1937] A.C. 500. For a Swedish decision to the same effect see 18 *B.Y.B.I.L.* (1937), 215-21.

³ [1937] A.C. 500. See also *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122; 17 *B.Y.B.I.L.* (1936), 120-9; 18 *B.Y.B.I.L.* (1937), 212-21.

were issued in America, they were expressed in terms of American currency, if repaid in America their value was to be estimated by reference to American coins, they were secured by a pledge agreement made and performed in America, and the bonds into which the notes were later converted were registrable and transferable only in New York.

The next task of the court is to construe the particular contract according to its proper law in order to determine the correct meaning of the gold clause. In other words the question is whether it is a gold-coin clause or a gold-value clause, and in order to decide this the practice of the English courts is to consider the terms in which the contract is expressed and the surrounding circumstances that were present to the minds of the parties at the time of the loan.¹ No fixed rule can be laid down, but the view taken by the courts is that if the apparent object of the parties is to guard against currency fluctuations, the clause must be read as a value clause, unless there is clear language in the contract to the contrary. This was laid down in *Feist v. Société Intercommunale Belge d'Électricité*,² where the proper law of the contract was English.³ The facts were these:

How gold clauses are construed

In 1928 a Belgian company issued loan bonds which provided for the repayment of the capital and for repayment of interest 'in sterling gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the first day of September, 1928'. One of the terms provided that the bonds should be construed and the rights of the parties regulated according to the law of England as a contract made and to be performed in England.

Farwell J. and the Court of Appeal held that this clause determined, not the measure of the borrower's liability, but the mode in which the debt was dischargeable, i.e. by payment of gold coins, and that as at the date of the action bank-notes were legal tender in England, the lender must be satisfied with notes to the nominal value of the loan. According to this view the clause was intended by the parties to be a gold-coin clause.

¹ *Rex v. International Trustee*, [1937] A.C. 500.

² [1934] A.C. 161; *Khoury v. Khayat*, [1943] A.C. 507. If the proper law is not English, the court should follow the view adopted by the foreign proper law. This was not done by the House of Lords in *Rex v. International Trustee*, [1937] A.C. 500; 18 *B.Y.B.I.L.* (1937), 219. According to Lord Russell of Killowen the 'Feist construction' has prevailed in most countries; *ibid.*, at p. 556. See Mann, *The Legal Aspect of Money*, pp. 101-3.

³ *Feist v. Société Intercommunale Belge d'Électricité*, [1934] A.C. 161; followed in *New Brunswick Ry. Co. v. British and French Trust Corp.*, [1939] A.C. 1.

Lord Russell of Killowen, however, who delivered the unanimous judgment of the House of Lords, reached the opposite conclusion. He demonstrated that the parties could not have intended the words of the issue to bear their literal meaning, for at the time of the issue of the bonds bank-notes had been substituted for gold as legal tender and gold coin was substantially no longer in circulation. In his view the object of the clause was to guard against the departure of England from the gold standard. The clause referred, not to the mere mode of payment, but to the measure of the borrower's obligation.

'I think', he said, 'that the parties are referring to gold coin of the United Kingdom of a specific standard of weight and fineness, not as being the mode in which the company's indebtedness is to be discharged, but as being the means by which the amount of that indebtedness is to be measured and ascertained.'¹

Tendency
to construe
contracts
as gold-
value
clauses

Thus in this case the words were construed to be a gold-value clause. In *New Brunswick Railway Co. v. British and French Trust Corporation*,² the railway company issued a series of bonds in 1884, each of which contained a promise to pay to the bearer

'the sum of £100 sterling gold coin of Great Britain of the present standard of weight and fineness at its agency in the City of London, England, with interest thereon at the rate of five pounds sterling *per centum per annum*'.

The construction put upon these words by the House of Lords was that the *Feist* construction applied to the payment of the bonds, but not to the payment of interest. The reference to gold contained in the contract was limited to the repayment of the principal sum. Its omission in the case of payment of interest, since it was presumably intentional, could not be disregarded by the court.

Proper law
of discharge
of obligation
governs
repayment

Having ascertained the meaning of the gold clause in question it remains for the court to decide whether it can be legally implemented according to the proper law that governs the substance of the obligation. The duty of the borrower is to pay that sum of money which, according to the provisions of the proper law that governs repayment, he is liable to pay. Repayment is performance, and performance is a matter of substance. Effect must be given to the state of that law, not at the time of the original loan, but at the time of repayment. The subject

¹ At p. 172.

² [1939] A.C. 1.

may be illustrated by reference to two cases that we have already considered, both concerned with gold-value clauses.

In *Feist's Case*,¹ where the obligation, governed by English law, was to repay the loan 'in sterling gold coin of the United Kingdom of or equal to the standard of weight and fineness existing' in 1928, the date of the loan, it was held that, though by 1932, the date of repayment, a later English statute had substituted paper for gold as the means of payment, and though the paper pound was of less value than the 1928 pound, yet the borrower must pay as many paper pounds as represented the gold value, according to the 1928 standard of weight and fineness, of the nominal sum due to the lender. The introduction of inconvertible paper money by the Gold Standard (Amendment) Act, 1931, did not invalidate the gold clause.

The same result would have been reached in *Rex v. International Trustee*² but for the fact that the currency legislation between the date of the loan and the term of repayment took a different course in America from what it did in England. The Joint Resolution of Congress had enacted that:

Every provision which purports to give a creditor a right to require payment in any amount in money of the United States measured by gold is contrary to public policy, and every obligation containing such a provision shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender.

There was no option, therefore, but to hold that, since the proper law of the contract was the law of New York, the obligation of the borrower was discharged by the payment in the existing American currency of the nominal amount of the bonds.

In *Rex v. International Trustee* the contract was subject to the law of New York and New York was the place of payment. But if the proper law and the law of the place of performance differ, which of these determines the effect of legislation invalidating gold clauses?³ There can be little doubt that on principle the question is governed by the proper law, since it is one that affects, not the incidents and mode of performance, but the very substance of the obligation. As Dr. Martin Wolff has said, the statutory abolition of a gold clause alters 'the main content of the obligation; the debtor has to pay less than before,

¹ *Supra*, p. 253.

² *Supra*, p. 252.

³ Mann, *The Legal Aspect of Money*, op. cit., pp. 260-5; 6 *Vanderbilt Law Review*, 528-30.

because he "owes" less than before'.¹ Yet in the *New Brunswick Railway Company Case*² the Court of Appeal took the opposite view.³ In that case the Canadian legislature had passed the Gold Clauses Act, 1937, which in effect abrogated gold clauses. Although the Court of Appeal found the proper law to be the law of New Brunswick, it held that the Act did not invalidate the obligation of the debtor to pay the bonds in accordance with the terms of the gold-value clause. The general reasoning was based on the erroneous assumption⁴ that the *lex loci solutionis* governs any particular obligation which is performable in a country other than the country of the proper law.⁵ The House of Lords refused to determine the proper law and avoided the issue by holding that the Canadian Act had no retrospective effect. Unfortunately, however, Lord Romer expressed what is considered with respect to be the heretical opinion that in a contract which is governed by the law of one country but which provides for its performance in another country, a term is to be implied that such performance shall be 'regulated by' the *lex loci solutionis*.⁶ Unless a restrictive construction is placed upon the words 'regulated by', the effect of this dictum in many cases would be to remove the substance of the obligation from the control of its proper law.

Money of payment The final matter to be considered is the discharge of a money obligation.

Let us suppose once more that an English seller has agreed to sell goods to an Australian buyer for £500 and that the money of account, i.e. the contractual currency, is the Australian pound.

The amount of the debt, therefore, is five hundred Australian pounds and no more, despite the divergence in value between the English and Australian currencies. But this is not the end of currency problems, for the question now arises—What is the money of payment? In what currency must the debt, the value of which has been measured by reference to Australian currency, the money of account, be paid? This is not a question of what amount of coins or other currency the buyer must pay,⁷ but in what currency he must tender the amount that he has agreed to pay.

¹ *Private International Law*, p. 478.

² *Supra*, p. 254.

³ [1937] 4 All E.R. 516.

⁴ *Supra*, pp. 241 et seqq.

⁵ See especially at p. 526, *per Greer L.J.*, and at pp. 540 and 541, *per Scott L.J.*

⁶ [1939] A.C. 1, at pp. 43-44.

⁷ *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122, 148, *per Lord Russell*.

This is a matter affecting the mode of performance that is determined by the *lex loci solutionis*,¹ and the rule is that the debt is dischargeable in the currency of the country where the debt is payable.² If, therefore, in the hypothetical case given above the price of the goods sold is payable in Australia, the buyer is discharged by the tender of five hundred Australian pounds.

Law of
place of
payment
determines
money of
payment

When, however, the money of account is the currency of one country and the debt is payable in another country, a problem of conversion arises. If the Australian buyer is contractually bound to pay the price in England, he discharges his obligation by the tender of English pounds,³ but, since the English and Australian pounds differ in value, he discharges the debt by tendering the sterling equivalent of five hundred Australian pounds. He will tender the quantity of sterling that suffices to purchase in a recognized and accessible market in England five hundred Australian pounds.⁴ The date at which the rate of exchange must be calculated is the date at which payment is due.⁵

Conversion
of money
of account
into money
of pay-
ment

¹ *Supra*, p. 245.

² *Auckland Corporation v. Alliance Assurance Co.*, [1937] A.C. 587; *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122, 148, 151; *Mount Albert Borough Council v. Australasian Temperance and Mutual Life Assurance Society*, [1938] A.C. 224, 240-1.

³ Presumably he may alternatively tender Australian pounds, *Marrache v. Ashton*, [1943] A.C. 311, 317, but if action is brought for the recovery of the money the English court can give judgment only in pounds sterling, *infra*, pp. 675-6.

⁴ *Marrache v. Ashton*, [1943] A.C. 311.

⁵ *Syndic in Bankruptcy of Khoury v. Khayat*, [1943] A.C. 507; *Cummings v. London Bullion Co.*, [1952] 1 K.B. 327.

CHAPTER IX

NEGOTIABLE INSTRUMENTS¹

1. Introductory. *Pages 258–9.*
2. Negotiability in England. *Pages 259–60.*
3. Formal validity. *Pages 260–2.*
4. Interpretation. *Pages 262–3.*
5. Presentment, protest and notice of dishonour. *Pages 263–6.*

1. *Introductory*

Negotiable
instru-
ments raise
frequent
conflicts

Variations
in the laws
of the world

NEGOTIABLE instruments, since they represent the medium by which the trade of the modern world is conducted and financed, are a fertile source of problems that can be solved only by a reference to private international law. A bill of exchange drawn in England may be accepted in one foreign country, indorsed in another, and dishonoured in yet another; a foreign bill, exhibiting variations from its English counterpart, may circulate in the United Kingdom; and a bill that has been the subject of a series of purely foreign transactions may raise an issue in English litigation. Moreover, the English law of negotiable instruments differs considerably from that of other countries, and though there is no topic which more urgently requires a unification of the law throughout the world this is a goal which has yet to be reached. It was agreed by conventions made at Geneva in 1930: (*a*) to adopt a uniform law for bills of exchange and promissory notes; (*b*) to settle questions of private international law arising in connexion with bills and notes; and (*c*) to unify the rules concerning stamp duties.² The United Kingdom, however, has adopted only the last convention.³ What increases the difficulty of the present inquiry is that the Bills of Exchange Act, 1882, in a section which is often ambiguous and at times unintelligible, has codified the law on certain matters.

Negotiable
instrument
contains
several
separate
contracts

A preliminary fact which should be appreciated, since it explains the rules for the choice of law adopted in England

¹ On this topic reference should be made to Falconbridge, *op. cit.*, pp. 316 et seqq.

² League of Nations Series II, C. 360, M. 151, 1930 II. For an article on (*b*) see Dr. H. C. Gutteridge in *The Journal of Comparative Legislation and International Law*, xvi. 53.

³ There are two conventions, one relating to cheques, the other to bills of exchange and promissory notes.

and indeed in most other countries, is that a negotiable instrument is a document that contains several distinct contracts.¹ Each party who puts his name to the document incurs a separate liability. In the case, for instance, of

a bill of exchange drawn by *A* on *B* to the order of *C* and indorsed by *C* in favour of *D*,

the original contract between *A* the drawer and *C* the payee is followed by what the Bills of Exchange Act calls 'supervening contracts' made by the acceptor and indorser. The principal debtor upon whom the primary liability rests is the acceptor, while the drawer and indorsers are his sureties for the performance of his contract.

Since the liability of the sureties is subsidiary to that of the primary debtor, it is arguable that when a conflict of laws occurs the position of each contracting party should be determined by a single law, namely, the law which governs the acceptance. This, however, is not the view taken by English law. The Act adopts the general principle that the liability of each separate contracting party is governed by the law of the place where each separate contract is made. There is no right in the parties to select their own proper law. The principle, subject to a few exceptions, is *locus regit actum*.

The various contracts are not governed by a single law

2. Negotiability in England.

A question may arise whether a foreign document which is regarded as negotiable in the country of its origin is also negotiable for the purposes of its transfer in England. This question was neatly raised in *Picker v. London and County Banking Co.*²

Status of foreign instruments

Certain Prussian bonds, which the Court of Appeal assumed to be negotiable by the law of Prussia, came into the possession of *X* after they had been stolen from the plaintiff. *X* deposited them with the defendants to secure his overdraft. In an action for their recovery, the defendants claimed a good title to the bonds, on the ground that they had taken delivery of them *bona fide* and for value.

This plea, that the property in a *res furtiva* had passed by delivery, could succeed only if the bonds were negotiable instruments in the eye of English law. It was rejected on the simple ground that, though a negotiable instrument is regarded as cash the ownership of which passes by mere delivery, yet this attribute must be conferred upon it by English law.

¹ See especially Dicey, p. 679.

² (1887), 18 Q.B.D. 515.

'Is evidence', asked Bowen L.J., 'that an instrument or piece of money forms part of the mercantile currency of another country any evidence that it forms part of the mercantile currency of this country? Such a proposition is obviously absurd, for, if it were true, there could be no such thing as a national currency.'¹

The rule, therefore, is that foreign documents may be negotiable in England, but only if they are recognized as negotiable either by statute or by a custom of merchants in this country.

We will now deal with the rules for the choice of law that apply when a bill drawn in one country is accepted, indorsed or payable in another.

The question of what law governs the *transfer* of a negotiable instrument is discussed in a later chapter.²

3. *Formal validity of a bill and of the supervening contracts.*

Lex loci contractus governs

It is enacted that the formal validity of a bill, drawn in one country and accepted, negotiated or payable in another, shall be determined by the law of the place of issue, and that the formal validity of each supervening contract, such as acceptance or indorsement or acceptance *supra protest*, shall be determined by the law of the place where such contract is made.³

Meaning of 'place of issue'

The 'place of issue' does not necessarily coincide with the place where the bill is written out or signed by the drawer, for since 'issue' means the first delivery of a bill, complete in form, to a person who takes it as a holder,⁴ the place of issue is where the first delivery is made. If X signs a promissory note in Florence and posts it to the payee in London, the place of issue is London. Again, the place where each supervening contract is made is the place where that contract is completed by delivery.⁵

The *lex loci contractus* in the rigid sense indicated above, therefore, exclusively regulates formalities and determines, for instance, whether a bill is unconditional⁶ or whether an indorsement is made in due form.⁷ The formalities of the *lex loci contractus* are not merely sufficient but essential, and owing to the positive terms in which the section is drafted the general rule

¹ At p. 520.

³ Bills of Exchange Act, 1882, s. 72 (1).

⁵ *Chapman v. Cottrell* (1865), 34, L.J. Ex. 186.

⁶ *Guaranty Trust Co. of New York v. Hannay*, [1918] 1 K.B. 43 (bill drawn in America on English bank); the Court of Appeal, [1918] 2 K.B. 623, held, however, that the bill was unconditional both by English and by American law, and that the question which law applied did not arise.

⁷ *Koechlin et Cie v. Kestenbaum*, [1927] 1 K.B. 889; *infra*, p. 475.

² *Infra*, pp. 471-7 et seqq.

⁴ *Ibid.*, s. 2.

that the formalities of the proper law are sufficient¹ cannot be extended to a bill of exchange.

The statute, however, raises two exceptions to the predominance of the *lex loci contractus*. Exceptions to rule

First, a bill issued out of the United Kingdom is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.² On the principle that claims based on foreign revenue laws will not be enforced,³ it has long been the rule that a contract made abroad is not void in England merely because it lacks the stamp required by the law of the place where it was made, unless, indeed, that law provides that an unstamped instrument shall be absolutely void.⁴ Having regard to the terms of the Act, however, it would seem that even in this last case a bill of exchange will not be invalid in England. (i) Foreign stamp laws

Secondly, a bill issued out of the United Kingdom which is formally valid according to the law of the United Kingdom, though not according to the law of the place of issue, is, for the purpose of *enforcing payment* thereof, valid *as between all persons who negotiate, hold or become parties to it in the United Kingdom*.⁵ The object of this exception, presumably, is to remove impediments from negotiability, for if the validity of a foreign bill depended upon its flawlessness by the law of the place of issue its negotiation in this country might be seriously affected. (ii) English dealings with foreign bills

If, for instance, a bill in the English form is drawn in France on an English drawee, indorsed in blank by the drawer in France, and later indorsed in England to the plaintiff, the acceptor cannot refuse payment merely because an indorsement in blank was void by French law at the time of its issue.⁶

It must be noticed, however, that the operation of the exception is restricted in two respects.

In the first place, a holder who relies upon the exception must prove that both he and the person against whom he seeks to enforce payment became parties to the bill in the United

¹ *Supra*, p. 228.

² S. 72 (1), proviso (a).

³ *Supra*, p. 133.

⁴ *Bristow v. Sequeville* (1850), 5 Exch. 275, 279; *James v. Catherwood* (1823), 3 D. & R. 190. The two Geneva conventions mentioned above, p. 258, provide that no cheque, bill of exchange, or promissory note is to be absolutely void for want of a stamp, though it may be made unenforceable until stamped.

⁵ Bills of Exchange Act, 1882, s. 72 (1), proviso (b).

⁶ Cp. *In re Marseilles Extension Ry. & Land Co.* (1885), 30 Ch.D. 598, where, however, the bills were drawn before the Bills of Exchange Act came into force. The French law was altered in 1922.

Kingdom. In the example given above, for instance, the plaintiff would be unable to rely upon the exception as against the French drawer.

In the second place, the exception is limited to a suit in which the plaintiff seeks to enforce payment of the bill. It has been held, for instance, that an action brought by a holder for a declaration that he is not liable to repay the amount received by him from the acceptor is not an action for 'enforcing payment' within the meaning of the Statute.¹ The point, however, is not free from doubt.²

4. *Interpretation.*

The Bills of Exchange Act, 1882, provides that:

Lex loci contractus governs

The interpretation of the drawing, indorsement, acceptance or acceptance *supra protest* of a bill is determined by the law of the place where such contract is made.³

If, for example, a bill drawn in Poland and accepted in London is expressed to be payable in Holland, the question whether the acceptance is general or qualified is determinable by English law.⁴

Meaning of interpretation

The difficulty is to ascertain the sense in which the word 'interpretation' is employed by the Act. Normally interpretation indicates the process by which certain expressions are construed and their legal meaning determined, as occurs, for instance, where it is decided that the words written by an acceptor indicate a qualified acceptance. But unfortunately there is high judicial authority for the view that *interpretation* in the present section covers not merely questions of construction but also questions relating to the legal effect, i.e. to the essential validity, of the various contracts contained in a bill.⁵ If this is true it means that whether, say, an indorsement constitutes an effective transfer of a bill must in all cases be determined according to the law of the place where the indorsement

¹ *Guaranty Trust Co. of New York v. Hannay*, [1918] 1 K.B. 43, Bailhache J.; but see Scrutton L.J. in the Court of Appeal, [1918] 2 K.B. 623, 670, where the case was decided on a different ground.

² Falconbridge, *op. cit.*, pp. 325-7.

³ S. 72 (2).

⁴ *Bank Polski v. Mulder & Co.*, [1942] 1 K.B. 497. Cp. *Sanders v. St. Helens Smelting Co.* (1906), 39 Nova Scotia L.R. 370, cited Byles on Bills, p. 310.

⁵ *Alcock v. Smith*, [1892] 1 Ch. 238, 256; *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K.B. 677, 683, 686; *Koechlin et Cie v. Kestenbaum*, [1927] 1 K.B. 889, 899.

was completed. The subject of transfer, however, is a matter that will be discussed below.¹

The Act makes one exception to the exclusive sovereignty of the *lex loci contractus*. It provides that:

Where an *inland bill* is indorsed in a foreign country, the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.²

Inland bill indorsed abroad an exception to general rule

An *inland bill* is one which is both drawn and payable within the British Islands, or drawn within the British Islands upon some person resident there. Any other bill is a foreign bill.³ This exception confirms the early decision of *Lebel v. Tucker*,⁴ where

a bill drawn, accepted and payable in England was transferred to the plaintiff in France by an indorsement which, though valid by English law, was insufficient by French law.

It was held that payment could be recovered from the acceptor. Payment must, therefore, be made to an indorsee of an inland bill if the indorsement is valid by English law, though void by the law of the place of indorsement; but in the case of a foreign bill payment is due on an indorsement valid at the place of indorsement, though void by English law. It must be observed that, since the provision is effective only 'as regards the payer', it does not apply to a dispute where two parties claim as holders of a bill indorsed abroad.⁵

5. *Presentment, protest, and notice of dishonour.*

When a bill is dishonoured, whether by non-acceptance or non-payment, a holder immediately gets a right of recourse against the drawer and the indorsers, but in order to enforce this right he is, as a general rule, required by English law to give due notice of dishonour to the drawer and to each indorser, and, in the case of a foreign bill, to cause it to be protested.⁶ With the exception of America, most foreign countries require the protest of a dishonoured bill.⁶ Protest is made by a notary public.

Internal law of England concerning dishonour

¹ *Infra*, pp. 471-7. For a most instructive account of the difficulty see Falconbridge, op. cit., pp. 327 et seqq.

² S. 72 (2), proviso.

³ S. 4. 'British Isles' means the United Kingdom of Great Britain and Northern Ireland, the islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them.

⁴ (1867), L.R. 3 Q.B. 77.

⁵ Byles on Bills, p. 312; citing *Alcock v. Smith*, [1892] 1 Ch. 238.

⁶ Byles on Bills, p. 241.

Private in-
ternational
law: Bills
of Ex-
change Act
72 (3)

The difficulty of finding the appropriate system of law to govern the problems that may arise upon the dishonour of a bill which has circulated in several countries is attacked by section 72 (3) of the Bills of Exchange Act. This runs as follows:

The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of protest or notice of dishonour are determined by the law of the place where the act is done or the bill is dishonoured.

Obscurity
of this
section

This obscure section verges perilously on the unintelligible. As Westlake observes, a reference to the place where an act, such as presentment or protest, is done scarcely meets the difficulty that arises from the act not having been done.¹ He suggests that the words 'or not done' must be interpolated. Dicey, on the other hand, would prefer to make the words read 'where the act is *to be* done'.² Again, the section refers to three events—presentment, protest and notice of dishonour—and then, on the question of choice of law, indicates two legal systems, the law of the place where the act is done and the law of the place where the bill is dishonoured. But how are these two systems to be distributed between the three events? Is, for instance, a question of presentment to be decided by the law of the place where the act is done, as Dicey argues,² or by the law of the place where the bill is dishonoured, as Westlake says?³

On prin-
ciple *lex*
loci solu-
tionis
applies

There is little doubt on the authorities, despite the obscurity of the Act, that the matters mentioned in the section, since they all concern the payment of a bill, come within the principle that the incidents and mode of performance are determinable by the law of the place of performance. Foote has stated the position with such perspicuity that we may be forgiven for quoting the passage *in extenso*.

'The drawer or indorser of a bill, who by the drawing or indorsement becomes the surety for the due performance of the acceptor's contract, knows, first, that the payment of the bill must be at the place where it is made payable. Secondly, he knows that the time of the payment, whether lengthened or not by days of grace, is to be determined by the law of the place where it is made payable; and when it is accepted generally, by the law of the place of acceptance. Now if the bill is not paid according to the law of the place of payment, when presented according to that law, he, the surety, will become liable to be called

¹ Westlake, p. 322.

² p. 697.

³ pp. 322-3.

upon to pay in place of the principal. Before, however, he can be so called upon, certain preliminaries, in addition to presentment and non-payment, must be fulfilled. It is at least reasonable to presume that these incidents of *non-payment* will be governed by the same law that applies to all the incidents of *payment*. It is the acceptor's contract that he guarantees, and he may fairly expect that the performance and the non-performance of that contract will be defined by the same law—the law of the place where it ought to be performed.¹

The decisions prior to the Act confirm this view that the governing system is the law of the place where the bill is payable.² Thus in *Rothschild v. Currie*:³

The
authorities
favour the
*lex loci
solutionis*

A bill was drawn in England, accepted and made payable in Paris, and indorsed in London by the defendant (payee) to the plaintiff. The drawer, payee and indorsee were all resident in England. The bill was dishonoured upon being presented for payment. The plaintiff gave notice of this dishonour to the defendant. The notice was sufficient by French law, but too late according to English law.

The court held that the sufficiency of the notice must be determined by French law. The bill, though actually made in England, must be taken, as between the drawer and payee, said Lord Denman in delivering the judgment of the court, to have been made in France according to the maxim *contraxisse unusquisque in eo loco intellegitur in quo, ut solveret, se obligavit*. 'And if this be so as between the drawer and payee, it is equally true as between the indorser and the indorsee; the former of whom must be considered as the drawer of a new bill, payable at the same place, in favour of the indorsee.'⁴

This rule that the law of the place where a bill is payable exclusively governs the incidents of payment and non-payment holds good only where the person liable is bound to pay in that place. In a modern case:⁵

Bills drawn in Poland and accepted generally by the defendants in London were expressed to be payable in Amsterdam. They were not presented for payment in Amsterdam, but after their maturity payment was demanded of the defendants in London. Presentment was necessary

¹ Foote, pp. 460–1.

² *Rothschild v. Currie* (1841), 1 Q.B. 43; *Hirschfeld v. Smith* (1866), L.R. 1 C.P. 340; *Horne v. Rouquette* (1878), 3 Q.B.D. 514.

³ *Supra*.

⁴ At p. 49.

⁵ *Banku Polskiego v. Mulder*, [1941] 2 K.B. 266. When this case was taken to the Court of Appeal, *sub nom. Bank Polski v. Mulder*, [1942] 1 K.B. 497, *supra*, p. 262, the point that the Dutch law of presentment applied was abandoned. See also *Cornelius v. Banque Franco-Serbe*, [1941] 2 All E.R. 728, 732.

by Dutch law, but, owing to the general acceptance, was unnecessary by English law.

The defendants argued that since payment was to take place in Holland the duty of the holder with regard to presentment was governed by Dutch law. Tucker J. held, however, that under section 72 (2)¹ the contract of acceptance was subject to English law, and that it was not one which according to English law compelled the acceptor to make payment in Holland. In the words of the learned judge:

‘Although the bills provide for presentment and payment in Holland, and payment in Holland is one of the methods by which the obligation of the acceptors can be performed, if, none the less, presentment in Holland does not take place, the acceptors according to English law still remain liable on the bills. These contracts, the proper law of which is admittedly English, are not contracts the performance of which by the acceptors must take place in a foreign country.’

Questions
concerning
date of pay-
ment

The Bills of Exchange Act² expressly refers the question of date of payment to the *lex loci solutionis*.

Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

Thus if the law of that country postpones the maturity of a bill owing to war or to a state of emergency, payment cannot be enforced in England until the foreign moratorium is lifted.³

¹ *Supra*, p. 262.

² S. 72 (5).

³ *Rouquette v. Overmann* (1875), L.R. 10 Q.B. 525; *In re Francke and Rasch*, [1918] 1 Ch. 470.

CHAPTER X

✓ TORTS

WHEN an action is brought in England upon a tort that has been committed abroad, the role of private international law is to specify the legal system according to which the rights and liabilities of the parties must be determined. The usual view is that either the *lex loci delicti commissi* or the *lex fori* must be chosen, or that these two laws must be combined. Choice lies between *lex loci* and *lex fori*

To measure the rights and liabilities of the parties by the *lex fori*, despite the favour with which this solution was regarded by Savigny,¹ would lead to what Cockburn C.J. once stigmatized as 'the most inconvenient and startling consequences'.² The most startling and the most unjust would ensue if, in accordance with the *lex fori*, the defendant were held responsible for what would be an innocent act in the place where it was committed. If it were the general rule that the *lex fori* was the sole arbiter, the plaintiff would be free to choose a forum where the law was more favourable to him than in the place of wrong, provided that he could find one where the defendant happened to be present.³ *Lex fori* cannot alone govern

Theoretically there is no doubt that the *lex loci delicti commissi* is the most appropriate law to govern the matter. If a plaintiff in English proceedings claims damages for a tort committed against him abroad, it is elementary common sense that the court should adopt the law of the place where the alleged infringement of his right occurred. Only in that way can the true character of his right and of the resultant obligation of the defendant be justly determined. It is that law to which the defendant owed obedience at the decisive moment, and it is by that law that his liability, if any, should be measured. It was considerations such as these that weighed with Holmes J. when he laid down his well-known *obligatio* theory. The learned judge said:

'But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in The *obligatio* theory of Holmes J.

¹ *Private International Law*, Guthrie's translation, pp. 205-6.

² *Phillips v. Eyre* (1869), L.R. 4 Q.B. 225, 239.

³ Hancock, *Torts in the Conflict of Laws*, pp. 54 et seqq.

any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is, that although the act complained of was subject to no law having force in the *forum*, it gave rise to an obligation, an *obligatio* which, like other obligations, follows the person and may be enforced wherever the person may be found. *But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, but equally determines its extent.* It seems to us unjust to allow a plaintiff to come here absolutely depending upon the foreign law for the foundation of his case, and yet to deny to the defendant the benefit of whatever limitations on his liability that law would impose.¹

This theory has not escaped criticism.² Nevertheless, it seems almost self-evident that the *lex loci delicti commissi* should be decisive and that the *lex fori* should apply only in so far as the recognition of an obligation as nearly equivalent as possible to that created by the foreign law would infringe its own doctrine of public policy or would conflict with its law of procedure. This view finds its simplest vindication in the fact that what has happened is 'of more acute concern to the foreign community than to the community of the forum'.³ It was the view of the statistists and it is adopted by most legal systems at the present day. Thus another eminent American judge has said:

'The plaintiff owns something and we help him to get it. We do this unless some sound reason of public policy makes it unwise for us to lend our aid. . . . If aid is to be withheld here, it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare.'⁴

The English doctrine ✓ English law has not taken this line. It has combined the *lex fori* and the *lex loci delicti*, but in such a way that the English court is not the mere guardian of its own public policy, but is required to test the defendant's conduct by a reference to the English as well as to the foreign law of tort. The rule on the matter is very far from satisfactory. It is the result of the interpretation put by judges and jurists upon a certain passage in the

¹ *Slater v. Mexican National Railway Co.* (1904), 194 U.S. 120; 24 Sup. Ct. 581. See also *Holmes J.* to the same effect in *Western Union v. Brown* (1914), 234 U.S. 542. Cheatham (3rd ed.), p. 534.

² *Cook*, op. cit., pp. 36, 117; *Guinness v. Miller* (1923), p. 291 Fed. 769, 770, per Judge Learned Hand.

³ *Hancock, Torts in the Conflict of Laws*, p. 62.

⁴ *Loucks v. Standard Oil Co. of New York* (1918), 224 N.Y. 99, per Cardozo J. Another view is proposed by *Morris*, 64 *H.L.R.* 881.

judgment of Willes J. delivered over eighty years ago in *Phillips v. Eyre*.¹ The passage reads as follows:

'As a general rule, in order to found a suit in England, for a wrong alleged to have been committed abroad, two conditions must be fulfilled. ✓
First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done.'²

These words were repeated by Lord Macnaghten in 1902.³ They have been taken by later generations to mean that in every action brought in England upon a foreign tort the plaintiff must prove that the defendant offended the law both of the *locus delicti* and of England.

We will now consider separately the two conditions laid down by the learned judge.

(a) *Actionable in England.*

This first condition seems to mean that a plaintiff who seeks to recover damages in England for what is an admitted tort according to the *lex loci delicti commissi* will fail, unless he proves that had the defendant's act been done in England it would have constituted an actionable wrong by English domestic law. The only English case in which a plaintiff has been defeated by his failure to satisfy this condition is *The Halley*,⁴ where the question was one of vicarious, not direct, liability. It was decided two years before *Phillips v. Eyre*.

No liability unless wrong would have been actionable if committed in England

Foreign shipowners sued the owners of a British steamer to recover compensation in respect of a collision caused by the negligent navigation of the steamer in Belgian waters. The defendants pleaded that at the time of the collision their steamer was under the charge of a pilot whom they were compelled by Belgian law to employ, and that they were not liable according to English internal law for the negligence of this compulsory pilot.⁵ The plaintiffs replied that by Belgian law an owner is liable for faulty navigation, even though due to the negligence of a compulsory pilot.

Judgment was given for the defendants by the Privy Council. Selwyn L.J., after pointing out that if any liability existed in the circumstances it must be the creature of Belgian law, Merits of the requirement questioned

¹ (1870), L.R. 6 Q.B. 1, 28.

² *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1, 28.

³ *Carr v. Francis Times & Co.*, [1902] A.C. 176, 182.

⁴ (1868), L.R. 2 P.C. 193.

⁵ This rule was altered by the Pilotage Act, 1913.

asked whether an English court was bound to apply that law in a case where, according to its own principles, no liability whatsoever existed. He repudiated the suggestion. He could find no adequate reason for the application of a foreign law to the prejudice of the subjects of other nations. He affirmed that it was contrary both to principle and authority to give a remedy for an act which constituted no wrong by English law. But it is pertinent to ask why a tenderness, which is withheld in other branches of the law, should be shown so generously to the defendant in a case of tort. It is, no doubt, prejudicial to an Englishman, who has made and lost a bet in Monte Carlo, that he should be liable for the amount due if sued in England. Yet his liability is clear.¹ An obligation arises from contract as well as from tort, and it is well established that a foreign contract is enforceable in England, notwithstanding that it is not actionable by English internal law.² It suffices that it is valid according to the foreign law. Why should the plaintiff to an action on a foreign tort be compelled to climb two hurdles instead of one?

Decision
probably
reflects a
misplaced
view of
public
policy

The most probable explanation of this strange decision was the necessity, in the opinion of the Privy Council, to enforce the policy of the English legislature as reflected in the Merchant Shipping Act, 1854.³ The policy of England with regard to compulsory pilotage had been expressly declared by the statute, and it would be tempting to conclude that it must not be sacrificed merely because a contrary policy prevailed in the *locus delicti*. If this is what convinced their Lordships, it is a further illustration of the fatal tendency to attribute extra-territorial effect to an English rule solely on the ground that it is contained in a statute.⁴

It is perhaps scarcely surprising that the decision should have been reached in 1868, for at that time the rules for the choice of law were to a considerable extent still immature and in many respects far different from what they have now become, as, indeed, is only too painfully apparent from certain passages in the judgment itself.⁵ What is surprising is that it should

¹ *Supra*, pp. 230 et seqq.

² *In re Bonacina*, [1912] 2 Ch. 394.

³ Hancock, *Torts in the Conflict of Laws*, p. 91; 39 *Transactions of the Grotius Society*, 50-53.

⁴ For a detailed criticism of this tendency see 39 *Transactions of the Grotius Society*, 39 et seqq (Kahn-Freund).

⁵ For example he endorsed the view of Story that the English court may disregard a foreign judgment if it is based on domestic legislation not recognized in

still be regarded with judicial equanimity, despite the greater awareness that now exists with regard to the underlying purpose of private international law. It has been accepted without objection in other parts of the British Empire, where it seems particularly out of place. As Professor Hancock says:

'It seems incredible that because in 1868 the Privy Council refused to enforce a particular rule of Belgian law, the courts of Canadian provinces should refuse to enforce any law of a sister province which happens to differ slightly from their own. Yet this appears to be the prevailing doctrine in Canada today. One would look far to find a more striking example of "mechanical jurisprudence", blind adherence to a verbal formula without any regard for policies or consequences.'¹

A question that English judges have not yet had occasion to answer is whether a plaintiff who sues in respect of a foreign tort must show, not only that the conduct complained of would have been actionable had it occurred in England, but also that the *jus actionis* is vested in him personally by English law. This was part of the issue in the Scottish case of *McElroy v. McAllister*² where the facts were as follows:

Precise
meaning of
'actionable'
doubtful

McElroy, while travelling on a lorry, was killed at Shap, in England, as a result of the negligence of the driver. His widow, in her capacity as executrix, sued the driver in Scotland, taking advantage of the rule of English internal law that the cause of action of the deceased had survived to her. The rule of Scots internal law, however, is that the right of action of an injured person dies with him.

On the assumption that *Phillips v. Eyre* is accepted by Scots law, it was necessary for the plaintiff to show that the defendant's negligence would have satisfied the first condition laid down by Willes J. had the facts occurred in Scotland. The Court of Session, by a majority, dismissed the claim on the ground that according to Scots law the negligence of the driver was not actionable at the suit of the widow, notwithstanding that it was actionable in the abstract. According to this interpretation of *Phillips v. Eyre*, damages will not be recoverable in the forum for conduct which in the abstract is actionable both by the *lex loci commissi* and by the *lex fori*, unless the person to whom the compensation is payable is

England or other foreign countries, or is founded on a misapprehension of what is the law of England', at p. 203. For the modern law see *infra*, pp. 630-4.

¹ Op. cit., p. 89.

² [1949] S.C. 110; 12 M.L.R. 248-52; 27 *Canadian Bar Review*, 816 et seqq.

identical in both laws. The *lex fori* dictates to the *lex loci delicti commissi* who the appropriate beneficiary should be. In most other countries the more enlightened view prevails that the law of the place of wrong is decisive on the matter. Lord Keith, in a dissenting judgment, pointed out that Willes J. spoke *obiter* when he formulated the first condition in *Phillips v. Eyre* and that he went further than was warranted by the decision in *The Halley*, the only authority upon which he could have relied. The emphasis should be on the wrongfulness of the defendant's conduct, not upon its actionability. In *The Halley*, no wrong whatsoever had been committed in the eyes of the English *lex fori*; in the instant case, the negligence of the driver was wrongful according to the Scottish *lex fori*.

(b) *Not justifiable by the 'lex loci delicti commissi'.*

What is
the correct
role of the
*lex loci
delicti
commissi*?

If a plaintiff who sues on a foreign tort in England must show that the wrong of the defendant would have been actionable had it been committed in England, it is only natural to assume that in addition he must show that it was in fact actionable by the law of the place where in reality it was committed. It is inconceivable that the *lex loci delicti commissi* should be allowed to play a less decisive part than the *lex fori* in the determination of the defendant's liability. This obvious truism was recognized by the Privy Council in *The Halley*,¹ where Selwyn L.J. said that there is no objection to an action in England for injuries committed abroad, provided that 'such injuries are actionable both by the law of England and also by that of the country where they are committed'.² Yet, two years later, in *Phillips v. Eyre*,³ Willes J. when stating the function of the *lex loci delicti commissi* used language which at first sight seems a little obscure. He referred to the matter in two passages. According to the first, the *lex loci delicti commissi* must say whether the act of the defendant was 'valid and unquestionable', according to the second, whether it was 'justifiable'. It is the latter of these epithets that has been preferred by later judges. Thus in 1902 Lord Macnaghten repeated the words of Willes J. and said:

'The act must not have been justifiable by the law of the place where it was committed.'⁴

¹ (1868), L.R. 2 P.C. 193.

² *Ibid.*, at p. 203.

³ (1870), L.R. 6 Q.B. 1.

⁴ *Carr v. Francis Times & Co.*, [1902] A.C. 176, at p. 182.

'Justifiable' is a strange word to use in connexion with conduct that has caused injury to another, for to justify an act means to show the justice of the act. No doubt it was sufficiently apt to describe the position of the defendant in the circumstances which confronted Willes J. in *Phillips v. Eyre*:¹

Defendant's act must not have been 'justifiable' by the *lex loci delicti commissi*

An action was brought in England against the defendant, an ex-Governor of Jamaica, for having assaulted and imprisoned the plaintiff during a rebellion in the island. Judgment was given for the defendant on the ground that his conduct, though originally illegal by Jamaican law, had later been excused by an Act of Indemnity passed by the local legislature.

This was a case in which the legislature took the view that the defendant was justified by the circumstances in acting as he had done, and, as Lord Mansfield said in an earlier case, 'Whatever is a justification in the place where the thing is done, ought to be a justification where the case is tried.'² But it does not follow that because a word is appropriate to a particular kind of case it should be used when laying down the broad doctrine applicable to torts in general.

The object of these remarks is not to quibble over a word. It is a matter of complete indifference whether the word 'justifiable' is used in the present connexion, and no one could reasonably cavil at its use provided always, however, that it is not given some strained and exotic meaning and thereby allowed to support an undesirable decision. 'Actionable' is an intelligible word in common use, but 'justifiable' is ambiguous, and the danger is that it may be interpreted in such a way as to warrant the grant of a remedy in England when none is obtainable in the place of wrong. To go thus far is indefensible. The right of a plaintiff to obtain damages in England for a foreign tort may be restricted within the limits of the English doctrine of public policy, but that it should be more ample than that afforded by the *lex loci delicti commissi* verges on the ridiculous. It is contrary to reason that by the chance place of the forum, by the luck of the draw, as it might be said, a plaintiff should obtain a remedy denied to him in the country where he suffered the injury. It is elementary common sense that he should not be free to better his position at the expense of the defendant by the selection of a congenial forum.

Objections to the word 'justifiable'

Suppose, for instance, that the defendant has lightly struck the plaintiff in a foreign country, the law of which denies a right to damages

¹ (1870), L.R. 6 Q.B. 1.

² *Mostyn v. Fabrigas* (1774), 1 Cowp. 161.

for a trivial assault, though it permits the institution of penal proceedings. Can the plaintiff take advantage of the common law and recover substantial damages in England?

This question, though not necessary to the decision, was considered by the Exchequer Chamber in *Scott v. Seymour*.¹ Wightman J. was of opinion that if both litigants were British subjects the action would lie; Williams J. was not prepared to agree; Crompton J. regarded the problem as 'a matter of some difficulty and doubt'; Blackburn J., though denying that the nationality of the parties was relevant, inclined to agree with Wightman J. This heretical suggestion was translated into practice by the Court of Appeal in *Machado v. Fontes*.²

The objections illustrated by *Machado v. Fontes*

In that case the plaintiff sued the defendant in England for a libel which had been published in Brazil. Defendant pleaded that by Brazilian law no civil action lay for the recovery of damages in respect of such a libel, though he might be criminally prosecuted at the suit of the State. This plea was supported by the argument that, since the libel was not actionable in Brazil, it was not actionable in England.

The Court of Appeal held that the plea was bad and that it must be struck out. Lopes L.J. was content to rest upon the reasoning that no act was 'justifiable' unless it was innocent in the country where it was done. Rigby L.J. agreed. He considered that the change of language from 'actionable' to 'justifiable' in *Phillips v. Eyre* was deliberate. In his view the nature and extent of the remedy in the foreign country was a matter of no importance, for everything must depend upon the innocence of the act. He said:

"The innocence of the act in the foreign country is an answer to the action. That is what is meant when it is said that the act must be "justifiable" by the law of the place where it was done."³

Machado v. Fontes criticized

Machado v. Fontes has been commended,⁴ reprobated,⁵ reconciled with doctrine,⁶ explained,⁷ doubted,⁸ followed by some

¹ (1862), 1 H. & C. 219.

² [1897] 2 Q.B. 231.

³ At p. 235.

⁴ Lorenzen, 47 *L.Q.R.* 485-7; Gutteridge, 6 *Cambridge L.J.* 20; Pollock, 13 *L.Q.R.* 233, though he considered it illogical.

⁵ Hancock, 22 *Canadian Bar Review*, 853; Martin Wolff, p. 497; Beale, 1292-3.

⁶ Schmithoff, *English Conflict of Laws*, pp. 148-51; 5 *I. & C.L.Q.R.* 466-71.

⁷ Hancock, *Torts in the Conflict of Laws*, p. 17. See also W. A. Steiner in 9 *M.L.R.* 188-9.

⁸ Falconbridge, 23 *Canadian Bar Review*, 315.

courts,¹ repudiated by others.² It is submitted that the decision is regrettable. It is at glaring variance with the rule of natural justice that the plaintiff should not reap an extra benefit by selecting a forum where the remedy is more favourable than in the place of wrong.³ It replaces the word 'justifiable' used in the principal case, *Phillips v. Eyre*, by a word even more comprehensive and more ambiguous. It unreasonably enlarges the content of the substantive right given to the plaintiff by the law of the country where the right arose. It ousts the *lex loci delicti commissi* from its rightful role, which is *inter alia* to specify the legal consequences that flow from the defendant's act. In short, it virtually submits the existence, the nature and the quantum of the obligation to the mercy of the *lex fori*.⁴ Thus it enables the defendant to rely upon a defence available to him by the *lex fori* though it is not recognized by the *lex loci delicti commissi*. Again, it would appear to leave the question of remoteness of damage to the *lex fori*,⁵ thus raising an illogical exception to the rule that obtains in contract.⁶ Its implication is that what is neither a tort nor a crime in the foreign country may be treated as a tort in England. Thus in *McLean v. Pettigrew*,⁷ decided by the Supreme Court of Canada:

The plaintiff, while travelling in Ontario as a gratuitous passenger in the defendant's car, was injured in an accident in which the car was involved. By the law of Ontario the plaintiff, being a gratuitous passenger, was not entitled to recover damages in a civil action. The defendant was prosecuted in Ontario for driving without due care and attention in contravention of a local statute which imposed penalties for the offence if proved, but he was acquitted.

¹ *McLean v. Pettigrew*, [1945] S.C.R. 62 (Canada).

² *Lieff v. Palmer*, [1937] 63 Que. K.B. 278 (Canada). In *Naftalin v. L.M.S.*, [1933] S.C. 259, it was repudiated in no uncertain terms by the Court of Session. The plaintiff's son was fatally injured at Leighton Buzzard, owing to the admitted negligence of the defendants, while travelling from London to Glasgow with the return half of a ticket bought in Glasgow. The plaintiff claimed damages by way of *solatium*. Such damages are allowed by Scottish, but not by English, law. It was held that the governing law was English law as being the *lex loci delicti commissi*; that the right to claim *solatium* was a substantive right, not a mere matter of procedure; and that therefore the claim must fail. This decision was followed in *M'Elroy v. M'Allister*, [1949] S.C. 110 and in *Mackinnon v. Iberia Shipping Co. Ltd.*, [1954] 1 LL. L. Rep. 275; 3 I. & C.L.Q.R. 693.

³ 22 *Canadian Bar Review*, 853.

⁴ Falconbridge, *op. cit.*, pp. 818-20.

⁵ 3 I. & C.L.Q.R. 651 et seqq. (J. A. C. Thomas).

⁶ *Infra*, pp. 670-2.

⁷ [1945] S.C.R. 62. See Falconbridge, pp. 694-702.

The plaintiff, in an action brought in Quebec, was held entitled to recover damages for the injuries caused to him on the ground that, since in the opinion of the court the defendant was guilty of careless driving, his act was not innocent. Such a surprising decision might not have been given by an English court, but it at least illustrates what inelegant results may be reached unless 'justifiable' is treated as synonymous with 'not actionable'.

Extent to which defendant can rely on *lex loci delicti commissi* If *Machado v. Fontes* is to be taken as representing the modern law, it must be said that an act committed abroad is justifiable unless it is either tortious or criminal by the *lex loci delicti commissi*. If, on the other hand, the decision is ultimately repudiated, the reasonable principle will then obtain that the defendant is not liable in England to pay damages for a foreign tort unless he has committed an actionable wrong according to the *lex loci delicti commissi*. In any event it is clearly established that an action will not be sustainable in England for an act which, according to the *lex loci delicti commissi*,

- (a) creates no liability whatsoever; or
- (b) is one for which the defendant has a valid defence; or
- (c) is one which has been legalized by some competent authority; or
- (d) is one which does not create a liability in tort for damages.

(a) No liability by *lex loci* If the act of the defendant creates no liability whatsoever according to the law of the place where it was committed, there is no liability that can be enforced in England. This will be the case, for instance, if an act such as enticing away a wife or a servant, which is tortious by English law, is not regarded as wrongful in the foreign country.¹ Thus in *The Mary Moxham*:²

It was successfully pleaded to an action brought against the owners of an English ship, which had damaged a pier in Spain, that by Spanish law the master and mariners were alone liable, to the exclusion of the owners, for negligent navigation.

(b) Valid defence according to *lex loci* A defence available to the defendant under the *lex loci delicti commissi* is equally available to him in English proceedings. In *McMillan v. Canadian Northern Railway*:³

A fireman, in the course of his employment by the respondents, was injured in Ontario owing to the negligence of a fellow servant. He sued in Saskatchewan for the recovery of damages. The defence of common employment is recognized in Ontario but not in Saskatchewan.

¹ Schmitthoff, *English Conflict of Laws* (3rd ed.), p. 154.

² (1876), 1 P.D. 107.

³ [1923] A.C. 120.

Apart from other considerations affecting this case, which are discussed below,¹ it is clear that the appellant could be successfully met in the Saskatchewan action by the defence of common employment.

If the wrongful conduct of the defendant is later excused by a competent authority in the country where he acted, as, for example, when an Act of Indemnity is passed by the local legislature, he has a complete defence to proceedings brought against him in England. This was decided in *Carr v. Francis Times & Co.*,² and also, as we have seen, in *Phillips v. Eyre*.³ The latter was a strong case, since the defendant, in his capacity as Governor, was a necessary party to the legislation upon which he based his defence.

An English court will not hold a defendant liable for an act which the *lex loci delicti commissi* does not regard as creating a liability enforceable in the courts. By that law the plaintiff may indeed be entitled to recover compensation from the defendant, but in order to succeed in England he must prove that he is entitled to sue for damages in respect of a wrongful act. This appears to be the effect of the Privy Council decisions in *Walpole v. Canadian Northern Railway*,⁴ and *McMillan v. Canadian Northern Railway*.⁵ The facts of the latter have already been partly given.⁶ There was, however, this further fact which stood in the way of the appellant's success.

The Workmen's Compensation Act of Ontario, after providing that an employer should be liable individually to pay compensation at a fixed scale to any workman injured in the course of his employment, directed that no action should lie for the recovery of the compensation, but that all claims should be determined by a Board specially established for the purpose.

In a case of this description, when action is brought in a foreign country the first question that requires consideration is one of classification. Is the claim based upon a tort or not? The court of the forum must examine the provisions of the statute in question and must decide whether they are of such a nature as to create a right founded in tort.⁷ The Privy Council in *Walpole's Case* addressed its mind to this question and decided that the claim of the plaintiff arose, not *ex delicto*, but *ex lege*. In the words of Lord Cave:

'No action for the negligence in question could have been brought in

¹ *Infra*. ² [1902] A.C. 176. ³ *Supra*, p. 273. ⁴ [1923] A.C. 113.

⁵ [1923] A.C. 120. ⁶ *Supra*, p. 276. ⁷ *B.Y.B.I.L.* 62, note 2.

Ontario apart from the statute; and the claim given by the statute is not a claim for damages for tort, but a claim (strictly limited in amount) for compensation for the accident.'

The claim, therefore, quite apart from the defence of common employment, was not sustainable in Saskatchewan, since the accident gave rise neither to a cause of action nor to criminal proceedings in the country of its occurrence.

Judgment
of Willes J.
has been
misunder-
stood

Such, then, is the interpretation that has been placed upon the words of Willes J. in *Phillips v. Eyre*: proceedings in England on a foreign tort will fail unless the conduct of the defendant was civilly or criminally unjustifiable in the *locus delicti* and unless it would have constituted a tort in the eyes of English law. If this is the meaning that the words were intended to bear, that very learned judge is indeed open to the charge that he introduced into the law of England what an American critic has stigmatized as 'a monstrous criterion for suits on foreign torts, comparatively backward, impractical, inherently inconsistent and imprecise, and incompatible with the liberal principles at the same time in England applied to other types of obligation'.¹ This same critic, however, argues with force that judges and jurists, especially Dicey, have misconstrued the words by disregarding their context.² The crucial passage in the judgment, which precedes the statement of the two rules, is that in which Willes J. is at pains to stress 'the true character of a civil or legal obligation and the corresponding right of action'. It runs as follows:

'The obligation is the principal to which a right of action in *whatever court*³ is only an accessory, and such accessory, according to the maxim of law, follows the principal and must stand or fall therewith. *Quae accessorium locum obtinent extinguuntur cum principales res peremptae sunt*. A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto. . . . The civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law.'⁴

What he
meant by
the first
condition

After this insistence upon the decisive role played by the *lex loci*, after insisting that the character of tortious liability must be

¹ Professor Yntema in 27 *Canadian Bar Review*, 121. See also 27 *Canadian Bar Review*, 666; Falconbridge, op. cit., pp. 809 et seqq.

² 27 *Canadian Bar Review*, 118 et seqq.; and also 4 *I.L.Q.R.* 7-10, where the argument is repeated.

³ Italics supplied.

⁴ *Phillips v. Eyre* (1870), L.R. 6 Q.B. at p. 28.

determined by the law of the place from which it derives its birth, it would scarcely be consistent, to say the least, to sanction a fundamental alteration of its character at the instance of the law of the forum from which its birth was not derived. Willes J. was the last judge to be accused of inconsistency, and there must be some explanation of his later statement concerning actionability in England. It is suggested by Professor Yntema that in this particular context the judge, addressing his mind to the question of jurisdiction, used the word 'actionable' in its primary sense as 'cognizable or triable', not as referring to substantive liability.

'Is it reasonable to construe this as more than a statement of a threshold requirement that a suit on a foreign "wrong" must be such as to be triable in England, e.g. not an action for trespass to foreign land¹ nor one excluded on principles of policy found for instance in the general maritime law as declared by Parliament (*The Halley*)?'²

It seems reasonably clear also that the word 'justifiable' was used by Willes J. to emphasize the established and obvious rule that what is a good defence in the *locus delicti* must be equally good in a foreign forum. His mind was addressed solely to 'the civil liability arising out of wrong', and there is nothing in his remarks to show that he contemplated the possibility of a successful action in England in respect of an act which is civilly, though not criminally, innocent in the *locus delicti*. What he meant by the second condition

The opportunity is still open to the House of Lords to rescue English law from an unfortunate doctrine that is alien to its spirit.

[Since in every action on a foreign tort reference must be made to the law of the place where the tort was committed, it is necessary to have some test by which in a case of doubt the identity of that place may be determined.] In the normal case, when the facts and events that are said to constitute the tort have all occurred in one country, there is, of course, no difficulty. But a more complicated situation arises when the facts occur some in one country, some in another. What is the *locus delicti*?

If *A* negligently lights a fire on the English side of the Scottish border, and the fire spreads into Scotland where it there burns down *B*'s house, has the tort been committed in England or in Scotland?

The importance of deciding this is evident, since the two laws may differ fundamentally upon the question of *A*'s liability.

¹ *Infra*, pp. 561-2 et seqq.

² 27 *Canadian Bar Review*, 118-19.

Theories that have been proposed Three different tests have been proposed for the determination of the matter.¹

✓ First, the place where the defendant did the act from which the harm ensues constitutes the *locus delicti*. Many arguments have been advanced in favour of this solution.²

✓ The second theory prefers the country in which the harm ensues. This represents the American doctrine.³ Thus Beale says that 'the place of wrong is the place where the person or thing harmed is situated at the time of the wrong',⁴ though the Restatement states it in more accurate language. 'The place of wrong is in the State where the last event necessary to make an actor liable for an alleged tort takes place.'⁵ Cook is of opinion that the theory has been adopted without an adequate discussion of the issues involved.⁶

✓ According to the third theory, adopted by the German Supreme Court⁷ and favoured by Cook,⁸ the place of wrong is the place in which the law is most favourable to the person wronged. The plaintiff can, at will, fix the *locus delicti* in any country in which any of the operative facts occurred.

✓ The theory expressed by the Court of Appeal The chief English authority in which the question has been considered is *George Monro Ltd. v. American Cyanamid and Chemical Corporation*.⁹

The plaintiffs alleged that the defendants were liable in negligence for selling a substance to them in New York without giving a warning of its dangerous qualities. The substance having been shipped to England, the plaintiffs became liable in damages to a farmer in England who had suffered injury by its use upon his farm.

The question to be decided by the Court of Appeal was whether leave should be granted to the plaintiffs, under Order xi, Rule 1 (*ee*) of the Rules of the Supreme Court,¹⁰ to serve notice of the writ upon the defendants in New York. This depended upon whether the action was founded on a tort committed in England. The court held that no tort had been committed by the defendants in England within the meaning of the Rule. The decision was greatly influenced by the extreme reluctance

¹ Wolff, pp. 493 et seqq.; 47 *L.Q.R.* 491 et seqq.

² They are summarized by Lorenzen in 47 *L.Q.R.* 493.

³ *Oney v. Midland Valley R.R. Co.* (1901), 108 Kan. 755; Beale, *Cases on the Conflict of Laws*, ii. 514.

⁴ *The Conflict of Laws*, ii. 1287.

⁵ S. 377.

⁶ *Legal and Logical Bases of Conflict of Laws*, p. 319.

⁷ 47 *L.Q.R.* 491-3; Wolff, p. 493.

⁸ *Op. cit.*, p. 345.

⁹ [1944] 1 K.B. 432.

¹⁰ *Supra*, p. 117.

which the courts always show to the grant of this permission,¹ and therefore perhaps it does not represent the considered view of English law upon the vexed question of the *locus delicti*. Scott L.J. was cautious. He said that even if it were arguable that any cause of action had arisen in England, this was insufficient in the circumstances to bring the case within Order XI.² His two brethren, however, submitted in effect to the first theory given above—the theory of the place of acting. Du Parcq L.J. said that the question to be asked in connexion with Order XI was: ‘Where was the wrongful act, from which the damage flows, in fact done? The question is not where was the damage suffered, even though damage may be the gist of the action.’³ Goddard L.J., however, attempted a deeper analysis of the problem. He said:

‘I find it of some assistance in coming to a conclusion in this case to analyse in my own mind what exactly is the cause of action and the right of action, which are two different things. The action is one of that class which is known as an action on the case, akin to an action of deceit. In an action on the case, the cause of action is the wrongful act or default of the defendant. The right to bring the action depends on the happening of damage to the plaintiff. Here the alleged tort which was committed was a wrongful act or default. It was the sale of what was said to be a dangerous article without warning as to its nature. That act was committed in America, not in this country.’⁴

It is submitted with respect that there is no such distinction. ‘Cause of action’, in the words of Parke B., ‘means all those things necessary to give a right of action.’⁵ It is the entire set of facts that gives rise to an enforceable claim—every fact which, if traversed, the plaintiff must prove in order to obtain judgment.⁶ A person has no right of action unless he has a cause of action, but if he has a cause of action there is nothing that impedes his right to bring the action, except, of course, some extraneous fact such as lapse of time under the Limitation Act. Since ‘cause of action’ comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment, nothing less than the sum total of these facts can be described as a ‘wrongful act’. In the instant case the tort alleged was negligence. To succeed in such a case the plaintiff must prove duty, breach and damage. Once he proves these, and not

¹ *Supra*, pp. 113–14. ² At p. 437. ³ At p. 441. ⁴ At p. 439.

⁵ *Hernaman v. Smith* (1855), 10 Ex. 655, 666.

⁶ So defined in Stroud’s Dictionary, *sub nom.* ‘Cause of Action’, citing Lord Esher in *Read v. Brown* (1888), 22 Q.B.D. 128.

before, the act of the defendant becomes a wrongful act, and therefore it constitutes a cause of action which in turn produces a right of action.

It would seem, then, that the place where a so-called wrongful act or default is committed is not necessarily the *locus delicti*. It is presumably a wrongful act to slander a man, or to construct a trap for a wayfarer, or to sell a dangerous substance without warning, but none of these acts without more constitutes a tort and so it is premature to refer to any *locus delicti*. A tort must be committed before it can be said where it was committed.

Suggested test An analysis of the task that confronts the court when dealing with a foreign tort may help to solve the problem. The court is required to ascertain the *locus delicti*, since the action will not lie unless the act of the defendant is unjustifiable by the law of that place. It is also required to determine whether the conduct of the defendant is actionable according to English domestic law. Therefore, in considering where the wrong has been committed, a wrong which must of necessity be one that is actionable by English law, the court cannot very well do otherwise than apply the principles of English law. According to these principles, no act or default is tortious until all the things necessary to give the plaintiff a cause of action have occurred. If of three facts necessary to give a cause of action only two have occurred, there is a tort in embryo, but not a complete tort. The third fact has still to occur, and it would seem that the place in which its occurrence completes the tort constitutes the *locus delicti*. By reason of something that has happened in this place it is possible to say for the first time that a tort has been committed. It is submitted, therefore, that the *locus delicti* is the first place where the sequence of events is complete so as to create a cause of action. Or, to repeat the American Restatement: 'The place of wrong is in the State where the last event necessary to make an actor liable for an alleged tort takes place.'¹ What that last event is must be decided by the *lex fori*.

If this view is correct, the decision in *George Monro Ltd. v. American Cyanamid and Chemical Corporation*² is incorrect, unless it turned upon the stringent requirements of Order xi. It is noteworthy that in the course of his judgment Scott L.J. made a remark which goes some way towards supporting the present submission. He said:

'I express no opinion whether, if an act were committed out of the

¹ S. 377.

² *Supra*, p. 280.

jurisdiction which did not give rise to a cause of action in tort until something further had happened within the jurisdiction, the resultant damage could properly be regarded as flowing from a tort taking place within the jurisdiction.¹

In the later case of *Bata v. Bata*,² where defamatory letters had been written by the defendant in Zürich and posted to certain addresses in London, it was argued on the basis of the *Monro Case* that the tort had been committed in Switzerland where the letters had been written and that therefore leave to serve the defendant out of the jurisdiction should not be granted. The Court of Appeal, however, held that publication is the material element that completes the tort of libel and that the cause of action had arisen in England.

It only remains to notice that the English court, when it refers to the *lex loci delicti commissi*, merely applies the rules of that law that would be applicable to a purely domestic case similar to the one under consideration.³ In other words the reference is to the internal law of the *locus delicti*, not to its private international law.

Reference
to *lex loci*
is to its
domestic
rules

The law that governs maritime torts depends upon whether they have been committed within the territorial waters of some State or upon the high seas.⁴

Torts com-
mitted at
sea

In the former case the ordinary doctrine as laid down in *Phillips v. Eyre* applies. The tort is treated as having been committed within the jurisdiction of the country possessing sovereignty over the waters.

The High Court has jurisdiction to entertain a suit in respect of injurious acts done on the high seas,⁵ even though both the litigants are foreigners.⁶ It is a little difficult, however, to specify with absolute certainty the law which the court will follow in determining the rights and liabilities of the parties.

It seems clear, in the first place, that the law of the flag is the decisive factor wherever the acts complained of have all occurred on board a single vessel, for a ship is regarded for

Torts com-
mitted on
board a
single ship

¹ [1944] 1 K.B. at p. 437.

² [1948] W.N. 366; 92 Sol. Jo. 574.

³ Cook, *Logical and Legal Bases of Conflict of Laws*, p. 329; Falconbridge, 23 *Canadian Bar Review*, 312. But see Griswold, 51 *H.L.R.* 1205.

⁴ On maritime torts see 3 *I. & C.L.Q.R.* 115 et seqq. (D. Winter).

⁵ *The Tubantia*, [1924] P. 78.

⁶ *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. at pp. 536-7.

certain purposes as a floating island over which the national law prevails.¹ If, therefore, the tort is committed on board an English vessel, English law will alone apply, but if it is committed wholly upon a foreign ship and an action is brought in England, the plaintiff, if the analogy of wrongs done in a foreign country is followed, will have to prove that the act is unjustifiable by the law of the flag and is also actionable by English law. Where a flag is common to a political unit containing several different systems of law, as in the case of the British Commonwealth or the U.S.A., the law of the flag means the law of the port at which the ship is registered.²

Torts external to a ship It is scarcely possible, however, that the law of the flag should govern all wrongs committed on the high seas.

Suppose that the act giving rise to the dispute is external to the foreign ship in the sense that it has affected persons or property not on board, as, for example, where it is negligent navigation leading to a collision or to the destruction of a submarine cable. Is such an act on all fours from the point of view of choice of law with an act, such as an assault, which took place entirely on the ship?

Before we can answer this question we must ascertain the law by which the liability for what may be called acts external to a foreign ship are determined.

Collisions tested by general maritime law There is no doubt that the commonest kind of external act, namely, one which causes a collision, is governed solely by the general maritime law as administered in England, and not by that combination of English and foreign law which is required by the principle laid down in *Phillips v. Eyre*.³ 'All questions of collision are questions *communis iuris*'⁴ and must be decided by the law maritime.⁵ Brett L.J. affirmed this view in the following words:

'The case comes to this, whether an action for a tort committed on the high seas between two foreign ships (for I assume for this purpose that both are foreign ships) can be maintained in this country, although

¹ *Regina v. Anderson* (1868), L.R. 1 C.C.R. 161, 168; *Regina v. Keyn* (1876), L.R. 2 Ex. D. at p. 94. But not for the purpose of jurisdiction, *Chung Chi Cheung v. The King*, [1939] A.C. 160.

² *Canadian National Steamship Co. v. Watson*, [1939] 1 D.L.R. 273, cited 3 *I. & C.L.Q.R.* 116. Compare Merchant Shipping Act, 1894, s. 265, which deals with a conflict of laws in matters affecting masters and seamen.

³ *Supra*, pp. 269, et seqq.

⁴ *The Johann Friedrich* (1839), 1 W. Rob. 36, 37, per Dr. Lushington.

⁵ *The Wild Ranger* (1862), Lush. 553; *The Zollverein* (1856), Swa. 96; *The Leon* (1881), 6 P.D. 148; Dicey, p. 778; Foote, pp. 524-5.

it is not a tort according to the laws of the courts in that foreign country. From time immemorial, as far as I know, such actions have been maintained in the Court of Admiralty. . . . Therefore, even if I assume these to have been Dutch ships, it seems to me that, inasmuch as the injury to the plaintiffs was committed by the servants of the defendants, not in any foreign country but on the high seas, which are subject to the jurisdiction of all countries, the question of negligence in a collision raised in a suit in this country is to be tried, not indeed by the common law of England, but by the maritime law, which is part of the common law of England, as administered in this country.¹

The natural inference to draw from the expression 'general maritime law' is that there exists a body of law which is universally recognized as binding upon all nations in respect of acts occurring at sea. There is, however, no such law.² The expression, in truth, means nothing more than that part of English law which, either by statute or by reiterated decisions, has been evolved for the determination of maritime disputes.³ It is the law which, despite the animadversions of Westlake,⁴ must be applied to all questions of collision unless international regulations have been laid down by a convention between States.⁵ It may be asked, indeed, whether the bewildering number of laws that might require consideration would not make it impossible to apply the ordinary rule as laid down in *Phillips v. Eyre*.⁶

Meaning of
'general
maritime
law'

If, for instance, an action were brought in England in respect of a collision between two foreign ships of different nationality, the almost impossible feat of referring to three laws would impede any attempt to apply the ordinary rule. The impediment would become insuperable if a third ship of yet another nationality had contributed to the collision.

The question that now arises is whether this maritime law must be applied to all external acts, i.e. to all cases where the alleged wrong consists of some act, other than a collision, done by a foreign ship to the property of another, as, for example, where a submarine cable is fouled⁷ or where possession is seized of a wreck that is being salvaged by a third party.⁸ In

Does
general
maritime
law govern
all acts
external to
a ship?

¹ *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521, 537.

² *Lloyd v. Guibert* (1865), 1 Q.B. 115, 123-5.

³ *The Gaetano and Maria* (1882), 7 P.D. 1; 137, 143. ⁴ pp. 290-1.

⁵ The collision regulations at present in force are those which form an annex to the London Convention of 1929; Merchant Shipping (Safety and Load Line Conventions) Act, 1932, 22 & 23 Geo. V, c. 9, schedule 1.

⁶ *Supra*, p. 269.

⁷ *Submarine Telegraph Co. v. Dickson* (1864), 15 C.B. (N.S.) 759.

⁸ *The Tubantia*, [1924], P. 78.

many such cases, unlike the case of a collision, there would be little difficulty in applying the principle of *Phillips v. Eyre*, but in others it would be almost impossible. If, for instance, two or more foreign ships carrying different flags were involved in a dispute concerning the capture of whales¹ it might be virtually impossible to refer to each law, since the act might be innocent in one of the countries and wrongful in the others. Again, it seems a little strained to treat the law of the flag in maritime wrongs as being equivalent to the *lex loci delicti commissi* in the case of torts on land. The reason why English law requires proof that a wrong committed in a foreign country is unjustifiable by the *lex loci* is that the offending act has been committed within the exclusive jurisdiction of a foreign sovereign, but, as Brett L.J. has shown, there is no such thing as exclusive jurisdiction over the high seas.² If the place where a wrong is committed is subject to no exclusive jurisdiction, it is surely a misnomer to speak of a *lex loci*. It is possible to speak of a *lex loci* only where all the acts have occurred on board a single foreign ship. Finally, the sphere of authority possessed by the general maritime law has been described in such comprehensive terms by the judges that it would appear to cover all torts committed on the high seas.³

Conclusion In conclusion, therefore, the rules adopted by English courts for the choice of law, so far as regards torts committed at sea, may be stated as follows: First, a plaintiff who sues in England in respect of acts, all of which have occurred on board a single foreign vessel, must prove that the conduct of the defendant was not justifiable by the law of the flag and that it would have been actionable had it occurred in this country.

Secondly, all other acts occurring on the high seas and later put in suit in England must be tested solely by English maritime law.

¹ Dicey, pp. 805-6.

² *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521, 536-7.

³ *Idid.*; *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115, 125; *The Gaetano and Maria* (1882), 7 P.D. 1; 137, 143.

PART IV
FAMILY LAW

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CHAPTER XI

HUSBAND AND WIFE

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I. THE MEANING OF 'MARRIAGE'

Importance
of proving
validity of a
marriage

THE occasions are frequent and various upon which the existence or non-existence of a marriage must be established as a preliminary to legal proceedings. The matter may concern many different parts of the law. Thus the institution of a matrimonial cause, such as a petition for divorce, judicial separation or annulment of marriage, implies that the parties are related to each other as husband and wife. If a person claims an inheritance as the widow or widower of the deceased; if a beneficiary under a will asserts a right to pay death duties at a lower rate, as being the surviving spouse of the testator; in each case a preliminary to success is proof that a regularly constituted marriage exists. The existence of the marriage tie is equally essential in several departments of criminal law, as, for instance, where, in the case of desertion, cruelty or assault by her husband, a woman seeks relief under the Summary Jurisdiction Acts, 1895-1925, or where a person is prosecuted for bigamy. All these matters, and indeed many others, may raise a problem of private international law, since the parties in question may have contracted a union abroad which, though valid by the *lex loci celebrationis* or by the *lex domicilii*, does not create the status of marriage according to English law.

Two cases
in which
mono-
gamous
marriage
alone
considered

It is therefore essential that we should ascertain what the nature of a union must be before the English Courts will accept it as creating the relationship of husband and wife. We must know what constitutes a marriage according to English private international law. For a union to constitute a valid marriage according to English internal law it must be the voluntary union for life of one man and one woman to the exclusion of all others. Thus polygamous marriages are *inter alia* excluded. The question to be considered is whether a union must be of this monogamous character before it will be regarded as a valid marriage by private international law. It may be said without hesitation that so far as succession to English land and the exercise of English matrimonial jurisdiction are concerned no union will qualify as a marriage unless it is monogamous.

The succession *ab intestato* to immovables is governed by the *lex situs*, and it is clear that the peculiar canons of descent governing succession to an entailed interest in English land can scarcely determine kinship among the issue of a poly-

gamous union. The same is true of succession to a title of honour.¹

What is more important is that a matrimonial cause, such as a petition for divorce, will not be entertained unless the parties are monogamously married.² Their union must be monogamous, not merely within their intention, but also in the eyes of the legal system that determines its character.³

'I conceive that marriage, as understood in Christendom, may for *this purpose* be defined as the voluntary union for life of one man and one woman to the exclusion of all others.'⁴

The principle was established in *Hyde v. Hyde*,⁵ where a husband petitioned the English Court for a dissolution of the marriage which he had contracted with his wife in Utah according to the rites and ceremonies of the Mormons. It appeared in evidence that at the time of the marriage polygamy was a part of the Mormon doctrine and was the common custom in Utah. This fact was fatal to the petition, since it sought to take advantage of a system of law which was designed for the control of marriages of an entirely different nature. In the words of Lord Penzance:

'Now, it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and is wholly inapplicable to polygamy. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created.'⁶

The learned judge, after mentioning some of the provisions and remedies that form part of the matrimonial law, proceeded to show how unjust, and indeed absurd, it would be to apply these to polygamous unions. To divorce a Hindu, for instance, from one of his wives on the ground that he had committed adultery with bigamy, would be to furnish a remedy where there was no offence.

A marriage does not fail to qualify as monogamous merely because neither party is a Christian. All that is necessary is that a union should possess that quality of exclusiveness which

Non-Christian marriage may be monogamous

¹ *The Sinha Peerage Claim* (1939), 171 *Journals of the House of Lords*, 350; [1946] 1 All E.R. 348.

² *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130; *Brinkley v. A.-G.* (1890), 15 P.D. 76; *Nachimson v. Nachimson* (1930), P. 217; *Mehra v. Mehra*, [1945] 2 All E.R. 690.

³ As to what law determines whether a marriage is monogamous or polygamous see *infra*, pp. 299 et seqq.

⁴ *Hyde v. Hyde*, *supra*, at p. 133, *per* Lord Penzance. Italics supplied.

⁵ (1866), L.R. 1 P. & D. 130.

⁶ *Ibid.*, at p. 135.

is the essential feature of a marriage in the Christian sense. Therefore a marriage solemnized in Japan according to the local forms, between an Englishman domiciled in Ireland and a Japanese woman, was recognized as valid in England, upon proof that by the law of Japan marriage is the union of one man and one woman to the exclusion of all others.¹

Sufficient if marriage monogamous in its inception It is sufficient if the marriage, though contracted according to a non-Christian form, is monogamous in its inception. Thus one of the rules binding Hindus who belong to the Arya Samaj or to the Brahma Samaj sect is that their marriages must be monogamous. Therefore a marriage contracted by a Hindu in Bombay according to this faith was held to be monogamous for the purposes of English law notwithstanding that it was open to him at a later date to become an orthodox Hindu with freedom to take a second wife.²

Dissolubility of a marriage irrelevant to its original character The inception of the marriage is also the decisive date for testing whether it is a union for life. The court concentrates its attention solely upon the marriage contract and upon the law or laws by which its nature is determined, but disregards the manner in which it may be terminated. In *Nachimson v. Nachimson*³ the untenable proposition was advanced that account should be taken of the conditions upon which the dissolution of the union might later be obtained. It was argued that if the *lex loci celebrationis* was prepared to grant a divorce on easy terms, as, for instance, at the will of either of the parties, the union could not be recognized as a marriage by English law. This argument overlooked two facts.

First, the dissolubility of a marriage can have no bearing upon its original character, for the validity of any contract, whether matrimonial, mercantile or otherwise, stands apart from the conditions of its defeasance.⁴ The question to be answered is whether the parties have married in a form which contemplates that in the ordinary course of things they will cohabit as man and wife for the rest of their lives. The possibility of a later divorce cannot affect the character of their original intention.

¹ *Brinkley v. A.-G.* (1890), L.R. 15 P.D. 76. *Spivack v. Spivack* (1930), 46 T.L.R. 243 (Jewish marriage); *Isaac Penhas v. Tan Soo Eng*, [1953] A.C. 304 (marriage between a Jew and a non-Christian Chinese solemnized according to mixed Chinese and Jewish rites).

² *The Sinha Peerage Claim*, [1946] 1 All E.R. 348. Polygamy among Hindus was abolished by the Hindu Marriage Act, 1955.

³ [1930] P. 217. See also *Mehra v. Mehra*, [1945] 2 All E.R. 690.

⁴ *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 533.

Secondly, the *lex loci celebrationis* as such has nothing to do with the question of divorce, which is a matter solely for the law that happens to be the *lex domicilii* of the parties at the time of the suit. This may well be different from the law that governed the celebration of the marriage. Pressed to its logical conclusion, therefore, the argument that the original nature of a union depends *inter alia* upon its dissolubility seems to involve the manifestly absurd requirement that other laws with which the parties may later form a domiciliary connexion, i.e. all laws in the world, must also be considered. In *Nachimson v. Nachimson*:¹

The issue, which arose in a suit for judicial separation, was whether a marriage, contracted at Moscow between two domiciled Russians according to Russian law, constituted a marriage in the eyes of English law. Russian law, until it was altered in 1944, regarded a marriage as terminable at the will of either party. If both parties desired a divorce they were entitled to demand that the appropriate official should register the dissolution of their marriage. If one of the spouses desired a divorce against the wishes of the other, legal proceedings had to be instituted in court, but even so it was the duty of the judge to pronounce a decree of dissolution, provided that the wishes of the petitioner were formally declared.

The Court of Appeal held that notwithstanding the facility with which a divorce was obtainable the union possessed the essential legal characteristics of a valid marriage. While it lasted it precluded either spouse from contracting another marriage.

This decision corrects the anachronistic view, expressed, for instance, in *Hyde v. Hyde*,² that in English law a marriage must be a Christian marriage in the strict sense understood by the Western Church. Since the doctrine of the Church was that marriage was dissoluble only by death, it followed that the parties must have contracted a union for their joint lives. The doctrine of non-dissolubility, however, has long been abandoned by the law, and the only Christian characteristics now demanded are that a marriage should be monogamous, and that it should be a union for life in the sense of not being limited in duration. It is a Christian marriage according to English law if it is potentially for life.

The authorities that have been considered so far establish, then, that a polygamous union is not regarded as a marriage by English domestic law and is disregarded by English private international law so far as matrimonial jurisdiction and the

Are polygamous unions disregarded in every respect by English law?

¹ [1930] P. 217.

² (1866), L.R. 1 P. & D. 130.

succession to English land and titles of honour are concerned. The question, however, is whether this repudiation of polygamy extends to other branches of the law. Is a polygamous marriage never to be regarded as creating the relationship of husband and wife?¹ A few problems will show that this question is not of mere academic interest.

The Nationality Act, 1948, provides that 'a person shall be a citizen of the United Kingdom and colonies by descent if his father is a citizen of the United Kingdom and colonies at the time of the birth'.² The words mean that the 'person' must be the *legitimate* child of a British citizen. The principle of English internal law is that birth in lawful wedlock constitutes legitimacy.³ Is it, therefore, to be said that the privilege of British nationality must be denied under this section to the child of a British citizen who is polygamously married?

A British subject acquires a domicile in Persia, embraces the Moslem religion, and marries a Persian lady in Teheran according to the Mohammedan law which allows a plurality of wives. Later he takes another wife and ultimately dies in Persia leaving two wives and children by both. Money belonging to the deceased is held by an agent in England. Will an action, brought by the wives and children to recover the shares legally due to them under Mohammedan law, fail on the ground that according to English law the wives are not lawful wives and the children are not legitimate?⁴

Will it make any difference in the last case if the husband, though domiciled in Persia, contracted the two Mohammedan marriages in London?⁵

If one of the wives of a Mohammedan comes to England and marries an Englishman, can she be indicted for bigamy?⁶

Is a Mohammedan wife, who succeeds upon the death of her husband to property held under an English settlement, entitled in accordance with the Finance Act, 1910, to pay succession duty at the lower rate of 1 per cent. as being the 'wife' of the predecessor?⁷

Incongruous for English law to disregard polygamy

If the principle of *Hyde v. Hyde* is that English courts must rigidly deny recognition in any form to polygamous marriages,

¹ For a discussion of the subject see 48 *L.Q.R.* 341 et seqq. (Beckett); 66 *Harvard Law Review*, 961 et seqq. (Morris); 31 *B.Y.B.I.L.* 248 et seqq. (Sinclair). *Society of Comparative Legislation Journal*, ii. (N.S.), 379, an article on non-Christian marriages by Sir Dennis Fitzpatrick.

² S. 5 (1).

³ *Abraham v. A.-G.*, [1934] P. 17.

⁴ *Society of Comparative Legislation Journal*, ii. (N.S.), 376.

⁵ *Cp. In re Ullee* (1885), 53 L.T. (N.S.) 711; 54 L.T. (N.S.) 286.

⁶ Case put by Lush L.J. in *Harvey v. Farnie* (1881), 6 P.D. 35, 53. *Cf. R. v. Naguib*, [1917] 1 K.B. 359; *R. v. Superintendent Registrar of Marriages, Hammer-smith*, [1917] 1 K.B. 634, 647; *Baindail v. Baindail*, [1946] P. 122, 130.

⁷ *Cp. the South African case of Seedat's Executors v. The Master*, *infra*, p. 398.

the logical answer to the above questions will appear a little odd, if not ironical, when it is remembered that polygamy is a lawful feature not only of many foreign countries, such as Persia, Siam, Iraq, Egypt and Morocco, but also of many parts of the British Commonwealth. Moreover the Privy Council, in hearing appeals from these places, has consistently recognized the validity of polygamous marriages and the legitimacy of the children of second wives.¹ As one learned writer has said, to boycott polygamy would be to 'ignore all family relations among the great majority of the human race, treating all wives among them as mere concubines, all children as bastards and all property left by an intestate among them as escheating or becoming ownerless'.² It would also be inconsistent with the recognition by the courts of Jewish marriages despite their potentially polygamous character. Hebraic law permits a second wife to be taken during the lifetime of the first, and though this has long ceased to be the custom in European countries, the practice is by no means unknown in Morocco and countries farther east where Jews are personally subject to the law of their own religion. Having regard to the observations made by the judges in *R. v. Millis*,³ it is unthinkable, for instance, that a marriage in Syria between two Jews according to Hebrew religious law should be regarded as a nullity by an English Court. If this is a correct assumption, it would be strangely incongruous to place other potentially polygamous unions on a lower level.

'In these days it would be intolerable if we in this country were to refuse to recognize the validity of a Hindu marriage because polygamy is recognized under that faith and not under the faith of the Established Church of England.'⁴

Nevertheless, there were several dicta in the older authorities which supported the view that a union contracted according to the rites of a law which recognizes polygamy will in all respects and for all purposes be denied the status of marriage. In a well-known passage Lord Brougham expressed himself as follows:

'It is important to observe that we regard it [marriage] as a wholly different thing, a different status, from Turkish or other marriages

Dicta
favouring
disregard of
polygamy

¹ *Cheang Thye Phin v. Tan Ah Loy*, [1920] A.C. 369; *Khoo Hooi Leong v. Khoo Hean Kwee*, [1926] A.C. 529; *Khoo Hooi Leong v. Khoo Chong Yeok*, [1930] A.C. 346, 355.

² *Society of Comparative Legislation Journal*, ii. (n.s.), 379 (Sir Dennis Fitzpatrick).

³ (1844), 10 Cl. & F. 534.

⁴ *R. v. Rahman*, [1949] 2 All E.R. 165, 168; but see *supra* p. 292, note 2.

- * among infidel nations, because we clearly never should recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and validate.'¹

Lush L.J. considered that a marriage contracted abroad according to the local law of polygamy was 'a union falsely called marriage' which would not be recognized in England;² a few years later Stirling J. felt himself 'bound to hold' that a Baralong marriage³ was not valid;⁴ and in 1917 Avory J. was prepared to hold that a Mohammedan form of marriage contracted by an Egyptian in Egypt was to be regarded as a nullity in England.⁵

These
dicta now
repudiated

It is clear that *Hyde v. Hyde* did not go to these lengths. It merely decided that the powers possessed by the English court for the grant of relief to married persons are not adapted to any form of marriage that is not monogamous. Lord Penzance made this clear in the concluding words of his judgment, when he said that the issue was confined to the one question before him, i.e. to the petition for divorce. He continued:

'This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication or the relief of the matrimonial law in England.'⁶

Fortunately, the question is no longer doubtful, for it has now been decided that a polygamous union contracted in accordance with the law of the husband's domicile is recognized as a valid marriage by English law for many purposes. The first explicit break with the older view came with Lord Maugham's statement in *The Sinha Peerage Claim*, 1939.

'It cannot, I think, be doubted now (notwithstanding some earlier dicta by eminent judges), that a Hindu marriage between persons domiciled in India is recognized in our courts, that the issue are regarded as legitimate and that such issue can succeed to property, with the possible exception to which I will refer later.'⁷

¹ *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 532.

² *Harvey v. Farnie* (1880), 6 P.D. 35, 53.

³ *Infra*, p. 298.

⁴ *In re Bethell* (1887), 38 Ch.D. 220, 234.

⁵ *R. v. Naguib*, [1917] 1 K.B. 359. ⁶ (1866), L.R. 1 P. & D. 130, 138.

⁷ (1939), 171 Lords Jo. 350; [1946] 1 All E.R. 348. The exception was the inheritance of English land.

Seven years later the matter was carried further by the Court of Appeal in *Baindail v. Baindail*,¹ where the facts were these:

A man, while domiciled in India, married an Indian woman in India in 1928 according to Hindu rites. During the subsistence of this marriage, he later went through an English ceremony of marriage at the Holborn registry office with the petitioner, an Englishwoman.

It was held that the Hindu marriage, though potentially polygamous in character at that date, was to be recognized as valid by an English court, that it was a bar to a subsequent monogamous marriage in England, and that therefore the petitioner was entitled to a decree nisi for the annulment of her marriage. In the course of his judgment, Lord Greene, after adverting to the married status that the man possessed by virtue of the Hindu law of his domicile, said:

'Will that status be recognized in this country? English law certainly does not refuse all recognition of that status. For many purposes, quite obviously, the status would have to be recognized. If a Hindu domiciled in India died intestate in England leaving personal property in this country, the succession to the personal property would be governed by the law of his domicile; and in applying the law of his domicile effect would have to be given to the rights of any children of the Hindu marriage and of his Hindu widow, and for that purpose the courts of this country would be bound to recognize the validity of a Hindu marriage so far as it bears on the title to personal property left by an intestate here; one can think of other cases.'²

The exact limits within which a polygamous status demands recognition have not yet been worked out by the courts. Thus, in the same judgment, Lord Greene was at pains to stress that his remarks and the decision of the court had no bearing upon the law of bigamy, but that whether a man already married according to Hindu law would be indictable for going through a later ceremony in England would depend upon the correct interpretation of the word 'married' in the Offences Against the Person Act, 1861.³

¹ [1946] P. 122, affirming Barnard J., who had already given a similar decision in *Srini Vasan v. Srini Vasan*, [1946] P. 67.

² At pp. 127-8. In the earlier case of *In the Estate of Abdul Majid Belshah*, *The Times* newspaper 16 and 18 Dec. 1926; 14 and 18 Jan. 1927; 48 *L.Q.R.* 348, where a Mohammedan domiciled in Baghdad had married two English wives in England according to Mohammedan rites, an order of court was made which was based upon the assumption that both marriages were valid and also that the children of each wife were legitimate.

³ At p. 130. For a detailed discussion of the question of bigamy see 17 *M.L.R.* 344 et seqq. (G. W. Bartholomew).

The true
effect of *In*
re Bethell

The much discussed case of *In re Bethell*,¹ which at first sight seems opposed to the view that a polygamous union valid according to the *lex domicilii* of the husband is a marriage within the meaning of private international law, was not mentioned in *Baindail v. Baindail*.

The issue was whether *X* was the legitimate child of *Y*. This depended upon whether a union contracted by *Y* with Teepoo, a woman of the Baralong tribe in Bechuanaland, could be recognized as a marriage. It appeared that *Y*, who was domiciled in England, deliberately observed the customs of the tribe in the marriage ceremony; that he refused to be married by a priest in the English manner; and that he repeatedly declared himself to be a Baralong, desirous of marrying according to Baralong customs.

On the evidence Stirling J. held that *Y* had entered into a Baralong marriage which, since it was polygamous, was not a marriage according to the law of England.

If this decision was based upon the English domicil of *Y* it does not conflict with the decision in *Baindail v. Baindail*. A man who retains an English domicil is not permitted to contract a polygamous marriage. Stirling J., however, did not expressly rest his decision upon this ground, and it is possible that he arrived at his conclusion on the broad principle that any polygamous marriage, no matter where or by whom contracted, is a complete nullity so far as English law is concerned. That it was almost certainly the English domicil of *Y* which weighed with the learned judge has, however, been made clear by Sir Dennis Fitzpatrick in the following passage:

"The counsel for the infant referred to *Y*'s English domicil and admitted that if the marriage was a polygamous one it was invalid.² All their efforts were directed to showing that the marriage was not meant to be polygamous, and thus the real issue in the case was whether it was polygamous or not. On this, which was substantially an issue of fact, the judge's attention would naturally be concentrated, and he had no occasion to trouble himself much about the law. . . . It is submitted that when he said in effect that no non-Christian marriage was, as he expressed it, a valid marriage "according to the law of England", he was using the phrase "law of England" in the narrower sense of the law of England governing English marriages, the essential portions of which an Englishman, like *Y*, domiciled in England, would carry with him abroad, and not in the broader sense of the law of England as including all principles of private international law which would be followed by our courts."³

¹ (1887), 38 Ch.D. 220.

² *Ibid.*, at p. 226.

³ *Society of Comparative Legislation Journal*, ii. (N.S.), 386.

The final question is—What law determines whether a marriage is monogamous or polygamous? If, for instance, an Englishwoman marries a Hindu in London intending to live with him in his Indian domicil, is the character of the marriage determinable by English law as being the *lex loci celebrationis*, or by Indian law as being the law of the matrimonial domicil? The validity of the marriage requires to be established.

The character of a marriage is said to be determined by the *lex loci celebrationis*

There are two aspects of validity—formal validity and essential validity. Nothing is better settled than that the former is governed by the *lex loci celebrationis*, the latter by the law of the matrimonial domicil. The critical question, however, is whether the right to determine the requisite formalities means that the *lex loci celebrationis* also determines the character of the marriage. The case of *Chetti v. Chetti*¹ raises the issue in a neat form.

A Hindu, domiciled in India, married an Englishwoman at a London registry office. When he was later made respondent to a suit for judicial separation on the ground of his desertion, he pleaded that the marriage was invalid, since his personal law forbade him to marry a woman who was outside his own caste or who was not a Hindu by religion. He further pleaded that a plurality of wives was permitted by Hindu law and that therefore he could not be guilty of desertion.

One problem, therefore, was whether the marriage was polygamous, for if so judicial separation was not a possible remedy. If, in such a case, the *lex loci celebrationis* is the determining factor, the verdict will be in favour of monogamy, for any other form of marriage is unknown to the local law of England. The reverse will be true if the question is governed by the law of the matrimonial domicil. That law governs the essential validity of the marriage, what a Canadian judge once called the 'rights, powers and capacities of the parties',² and it is obvious that this comprehensive expression includes the right of the husband to take more wives than one. It has been held in Canada that the question is determinable by the law of the matrimonial domicil,³ but the contrary has been established in England. In *Chetti v. Chetti* Sir Gorell Barnes, after concluding that the disability alleged by the respondent was not of a general nature but one which Hindu law allowed to be discarded, held the marriage to be valid and granted a decree of judicial separation. He followed the earlier case of *Sottomayor v.*

¹ [1909] P. 67. For the present Hindu law see *supra* p. 292, note 2.

² *Connolly v. Woolrich and Johnson* (1867), *Lower Canada Jurist*, xi. 197.

³ *Ibid.*; but see 48 L.Q.R. 475-6.

De Barros (No. 2),¹ in which it was held that it would cause injustice 'to our subjects if a marriage was declared invalid on the ground that it was forbidden by the law of the domicile of one of the parties'.² There are other cases which also lead to the conclusion³ that whether a marriage is monogamous or polygamous falls to be determined by the *lex loci celebrationis*, and such is undoubtedly the present law.

On principle law of matrimonial domicile should determine the character of a marriage. It is submitted, however, that this doctrine which delegates to the *lex loci celebrationis* the power to determine the nature of a marriage is erroneous in principle.⁴ Marriage, though a universal institution, has no universal effect. Perhaps its one common phenomenon is the consensual union of a man and a woman. How the consent is registered, whether in this or that form or with no form, is of little moment. What matters is the nature of the union, and in this respect there is no universality. The consequences of the union, whether it excludes all other persons, whether it is terminable and if so by what methods, what rights, powers and capacities it vests in the parties—all these essential matters which define the nature of the union are subject to widely different rules in different legal systems. They are matters which affect in the most intimate fashion the personal relations of the parties in their daily existence, and therefore it would appear incontrovertible that in the nature of things and in accordance with established doctrine they fall to be determined by the law of the matrimonial domicile. The *lex loci celebrationis*, as such, has no concern with them. The one right of that law is to insist that a marriage contracted within its jurisdiction shall be solemnized in accordance with the local formalities. Its one function is to decide whether in fact the local marriage forms have been observed. As Cotton L.J. once remarked:

"The word "marriage" is used in two senses. It may mean the solemnity by which two persons are joined together in wedlock, or it

¹ (1879), 5 P.D. 94.

² *Ibid.*, at p. 104. For the unsatisfactory nature of this rule see *infra*, pp. 316-17.

³ *R. v. Superintendent Registrar of Marriages, Hammersmith, ex parte Mir-Anwarrudin*, [1917] 1 K.B. 634, *infra*, p. 380; *R. v. Naguib*, [1917] 1 K.B. 359; *Maher v. Maher*, [1933] 2 All E.R. 37. The same view prevails in Scotland, *Lendrum v. Chakravati* (1929), Scots Law Times Reports, 96 (a church marriage solemnized in Glasgow between a Hindu domiciled in India and a Scottish girl eighteen years of age held to be a monogamous marriage); the decision was overruled by *MacDougall v. Chitnavis*, [1937] S.C. 390, though on another point.

⁴ See 48 L.Q.R. 352 et seqq.

may mean their status when they have been so joined. The solemnity . . . must depend upon the law of the country where that solemnity takes place.¹

Equally obvious is it that their status as husband and wife must depend upon the law that governs their status in other respects.

Contrary to the above authorities, it is submitted, then, that whether a marriage is monogamous or polygamous ought in principle to be settled by the law of the matrimonial domicile, not left to the arbitrament of the *lex loci celebrationis*. According to this view, if a Moslem with an Egyptian domicile were to marry an Englishwoman in London, both parties intending to set up home in Egypt and in fact doing so, the result would be a polygamous marriage. Or, to take circumstances that have in fact occurred:

A domiciled Egyptian woman is married in Egypt to a British subject who is also domiciled in Egypt and who has become an Islamite by religion. The parties are married in the English form under the Foreign Marriage Act, 1892.² The marriage is later dissolved by the Sharia Court in a manner peculiar to a polygamous system of law.

If this marriage is to be regarded as monogamous merely because English formalities were observed, the consequences are unfortunate, at least for the woman. She remains a married woman according to English law, for the *Hammersmith Marriage Case*³ has ruled that a monogamous marriage cannot be dissolved by a polygamous method; but, according to the religious law applicable to her as a domiciled Egyptian, she is now an unmarried person. This diversity of view with regard to her status would, however, disappear if what is in fact and in intention a polygamous union were regarded as such by English law.

There is now high judicial authority for this view. In *Kenward v. Kenward*,⁴ Denning L.J. dealt as follows with the case where a person whose *lex domicilii* recognizes only monogamy marries another whose *lex domicilii* is founded on polygamy.

View of Denning L.J. that character of marriage not necessarily determined by *lex loci celebrationis*

'When an Englishwoman marries a man of a polygamous race at a register office in England *intending to set up home there*,⁵ the substantial

¹ *Harvey v. Farnie* (1881), 6 P.D. 35, at p. 47.

² *Infra*, p. 324.

³ *Infra*, p. 380.

⁴ [1951] P. 124, at pp. 144-5. For an adverse criticism see 66 *Harvard Law Review*, 983 et seqq. (J. H. C. Morris).

⁵ Italics supplied.

validity of the marriage, as well as its formal validity, depends on the personal law of the wife, and not on the personal law of the husband. It is a condition of the marriage that it should be monogamous. Suppose that the couple afterwards change their minds and go to live in the husband's homeland and he takes to himself another wife, as he may lawfully do there; the English wife cannot sue for divorce in England. She must bring her suit in his homeland, but she cannot succeed in it because polygamy is there permitted. Has she then no remedy? I say she clearly has a remedy in our courts. It was a condition of the marriage, imported by her personal law, and accepted by him, that the man should not take to himself another wife during the lifetime of the first. When the man took a second wife, that condition was broken and the marriage was voidable at her instance in our courts for failure of the condition.

'Now take a case where an Englishwoman domiciled here marries a man of a polygamous race in his homeland by the ceremonies of his country, *intending to live with him there, well knowing that she is entering into a marriage that is potentially polygamous*:¹ the substantial validity of that marriage depends on the personal law of the husband and not on the personal law of the wife.² The marriage is valid by the law of that country and is, I should have thought, valid here. There was no condition of the marriage that it should be monogamous. If he in his own country takes to himself another wife, the English wife cannot complain. She could not ask in these courts for the marriage to be avoided. So also, *if she while in England, marries a man of a polygamous race, intending to go to live with him in his homeland, knowing what marriage means in that country, there would be no condition that it should be monogamous, and the marriage would not be made on that basis*;³ and she could not complain if he there took another wife.⁴ *In re Bethell*⁴ supports the view that the substantial validity of a marriage may depend on the personal law of one of the parties to it; but I am not sure that the decision itself would be the same today.

'The case where a domiciled Englishman marries a woman of a polygamous race should, I think, be determined on the same principles as I have stated for the common case.'

In the later case of *Risk v. Risk*⁵ a domiciled Englishwoman had married at Alexandria a Moslem domiciled in Egypt, and in refusing her petition for nullity Barnard J. similarly stressed the fact that she had knowingly contracted a polygamous marriage.

'In the case now before me, although the ceremony was in Arabic, a language which the wife did not understand, I am satisfied that she

¹ Italics supplied.

² Such a case was *Risk v. Risk*, [1951] P. 50.

³ These words were evidently not cited to Barnard J. in *Maher v. Maher*, [1951] 2 All E.R. 37.

⁴ *Supra*, p. 298.

⁵ [1951] P. 50, 53-54.

realized that it was a ceremony of marriage according to Moslem rites and that those rites permit of other wives. The wife entered into the marriage contract with full knowledge of its polygamous character, and now on that very ground she seeks to have it set aside.'

It would seem that she would have been equally affected with this knowledge had the parties married in London or before a British marriage officer in Alexandria prior to establishing the matrimonial home in Egypt.

At first sight it may appear a little startling that a man whose personal law admits a plurality of wives should be free to contract a polygamous marriage by the adoption of formalities appropriate to monogamy, but if this possibility is repudiated it must also be repudiated in the reverse case, i.e. where a man, subject personally to a monogamous system of law, marries in a polygamous country according to the local forms. Nevertheless it was the opinion of Lord Brougham that in such a case the marriage would be monogamous. He said:

Lord
Brougham's
opinion

'An Englishman, marrying in Turkey, contracts a marriage of the English kind, that is, excluding a plurality of wives, because he is an Englishman and only residing in Turkey and under Mahometan law accidentally and temporarily, and because he marries with a view of being a married man and having a wife in England, and for English purposes; consequently, the incidents and effects, nay, the very nature and essence, must be ascertained by the English and not by the Turkish law.'¹

If this is so where a monogamist observes polygamous forms, there is no obvious reason why it should be different in the reverse case.

A more practical objection can be raised to the English rule as laid down in *Chetti v. Chetti*.² If the *lex loci celebrationis* finally determines the character of a marriage, the result is that in the eyes of English law a polygamist who, like the Hindu in *Chetti v. Chetti*, marries in England, instantaneously and automatically becomes a monogamist. It is a state of monogamy, however, that lacks durability, for if the husband returns to India he can once more safely and lawfully assume the mantle of a polygamist. If he takes another wife in India he will be a bigamist according to English law, but a respectable citizen according to the law of his religion. He will be a monogamist or a polygamist according to the country where he happens to be

Difficulties
created by
Chetti v.
Chetti

¹ *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 535.

² *Supra*, p. 299.

at the moment. This oscillation between one system of marriage law and another leads to complications, and provides room for ingenious scholasticism, as may be seen from the matrimonial adventures of one Naguib.¹

This gentleman, an Egyptian by birth and a Mohammedan by religion, entered into three marriages. He first married *X* in Egypt according to Mohammedan rites; he then married *Y* in England during the lifetime of *X*; he later divorced *X*; and finally he married *Z* in England, while *X* and *Y* were still living. He was indicted for bigamy in marrying *Z*, his wife *Y* still being alive.

The report does not mention his domicile, but presuming it to have been Egyptian it is instructive to consider his marital status, first, according to what is believed to be the true principle; secondly, according to his own contention; thirdly, according to the view of the court.

If the doctrine which submits the question of the married status to the law of the domicile upon the basis of which the parties marry is to be fearlessly and consistently applied, Naguib remained subject throughout his matrimonial career to the Mohammedan law of marriage, except that in the one matter of formalities he was obliged to observe the requirements of the *lex loci celebrationis*. The fact that by Mohammedan law he was capable of taking several wives excluded the possibility of bigamy. To support a conviction it would be necessary to revert to the threadbare reason that English law regards a polygamous marriage as 'a union falsely called marriage'.²

Naguib himself, appreciating no doubt the aloof attitude of English law towards polygamy, attempted to defend his position as a monogamist in England by the contention that he was a single man at the time of his marriage to *Z*. *X* was alive when he purported to marry *Y*. Therefore there was no valid marriage with *Y* and he had divorced *X* before marrying *Z*. He thus implicitly admitted that in some mysterious fashion he was transformed from a polygamous into a monogamous being when he embarked upon matrimony in England.

Avory J. would have no truck either with this argument or with polygamy, and he convicted Naguib. He said that even if the marriage to *X* had been proved, which he denied, never-

¹ *R. v. Naguib*, [1917] 1 K.B. 359.

² *Harvey v. Farnie* (1881), 6 P.D. 35, 53, *per* Lush L.J. But see the remarks of Lord Greene M.R. in *Baindail v. Baindail*, [1946] P. 122, at p. 130.

theless there must be a conviction, for it was not a marriage which could be recognized in England for the purposes of the indictment. He adopted Westlake's statement that a polygamous marriage 'will not be regarded in England as a marriage'.¹

II. CAPACITY TO MARRY

1. *Objections to the rule as commonly stated.*

According to the traditional and still prevalent view capacity to marry is governed by what may conveniently be called the *dual domicile doctrine*. This prescribes that a marriage is invalid unless, according to the law of the domicile of both contracting parties at the time of the marriage, they each have capacity to contract that particular marriage.² This is said to be true whether the incapacity is 'absolute', i.e. one which forbids a person, such as an infant, to marry anyone; or 'relative', i.e. one which forbids two individual persons, such as an uncle and niece, to marry each other.³

Usual
view: law
of domicile
of each
party must
be satisfied

Under this doctrine, a marriage, for instance, between a man domiciled in Denmark and a woman domiciled in England, the latter being his divorced wife's sister, is invalid, since a marriage between persons so related, though permissible in Denmark, is prohibited by English law.⁴

The doctrine would be comparatively innocuous if the expression 'the law of the domicile of each party' were construed to mean, not the rule that would be applied in that domicile to a purely domestic case, but the rule applicable to the particular marriage in question, i.e. to one containing a foreign element. A domestic rule, such as one forbidding a marriage between a man and his divorced wife's sister, need not be inevitably extended to a conflict of laws case where, for instance, the sister, though domiciled at present in England, proposes to marry a man domiciled in Denmark and to cohabit with him in that country. In such a case an English court might conceivably decide that this particular rule of the *lex domicilii* does not apply to a marriage which is primarily the concern of Danish law.⁵

¹ The Court of Appeal upheld the conviction on the ground that the marriage to X in Egypt had not been properly proved.

² Dicey, pp. 758, 760-3, 780-2; Wolff, pp. 332-7; Halsbury's *Laws of England*, vii. 124.

³ Westlake, s. 21, p. 57.

⁴ 34 *Transactions of the Grotius Society*, 100.

⁵ Cf. the forceful remarks of Cook, *Logical and Legal Bases of Conflict of Laws*, pp. 444 et seqq.

Application
of this view
may cause
injustice

If, however, 'the law of the domicile' means, as in practice it is in this context taken to mean, the internal law of the country concerned, the application of the dual domicile doctrine may produce a result that is calculated to shock the conscience of all save the most obstinate of doctrinaires. *In re Paine*¹ affords a good example of this.

An English testatrix, who died in 1884, left a sum of money on trust for her daughter, *W*, for life, and, if she died leaving any child or children surviving, then on trust for her absolutely.

W was a British subject domiciled in England. In 1875 she travelled to Germany and married *H*, her deceased sister's husband, a German subject. *H* had lived in England for some time shortly before the marriage,² and he and his wife continued to live there until their respective deaths. He died in 1919, she died some twenty years later. One daughter of the marriage survived *W*.

In these circumstances the legacy to *W* would not become absolute unless the surviving daughter was her legitimate child, for the rule is that a reference in a will to a 'child' means a legitimate child only, unless a different intention can be collected from the context.³ Whether the daughter was legitimate depended upon whether the marriage in 1875 was valid. At that time a marriage between a woman and her deceased sister's husband was prohibited by English law, but allowed by German law. Bennett J. adopted the dual domicile doctrine and held the marriage to be void because of the incapacity attaching to *W* under her pre-marriage *lex domicilii*.

In the circumstances the decision, though not the *ratio decidendi*, was unexceptionable, since the parties intended to establish, and did in fact establish, their matrimonial home in England. It was, therefore, for English law to determine the desirability of their marriage. But the dual domicile doctrine pays no regard whatsoever to the country where the parties cohabit as husband and wife. The doctrine would have required Bennett J. to reach the same decision had the parties lived together in Germany for the rest of their lives without once returning to England. Had this been the case the woman according to German standards would have been a lawful wife and a respectable member of society. Under the dual domicile doctrine, however, despite her abandonment of England, she would have possessed the status of a concubine and her sin

¹ [1940] Ch. 46. For a detailed analysis see 56 *L.Q.R.* 514 et seqq.

² See the facts as reported (1940), 161 *L.T.* 266, 267.

³ *Infra*, p. 391.

would inexorably have been communicated to her children. A doctrine which can work such havoc with human happiness and which is so out of harmony with what the reasonable man would expect is suspect. It is not common sense and for that reason alone is probably not part of the common law. As will be suggested later, it is sociologically unsound, wrong in principle, and in practice ineffectual in the sense that in the majority of cases its object can be frustrated without difficulty. Moreover, in the confused state of the authorities it is more than doubtful whether it represents the law of England.

It is submitted that the correct doctrine is that which submits the question of capacity to what may briefly be termed the law of the *intended matrimonial home*. More fully stated, the doctrine is this.

Rival view
based on
matri-
monial
home

The basic presumption is that capacity to marry is governed by the law of the husband's domicile at the time of the marriage, for normally it is in the country of that domicile that the parties intend to establish their permanent home. This presumption, however, is rebutted if it is found beyond reasonable doubt that the parties intended to establish their home in a certain country and that they did in fact establish it there.¹

At first sight, it may seem paradoxical that the governing law should depend upon a subsequent event—the place where the conjugal home is set up. It must be stressed, however, that the question whether a marriage is void for incapacity arises after, generally long after, its solemnization, so that it will be known whether the pre-marriage intention of the parties with regard to their future domicile has in fact been fulfilled. This theory of the intended matrimonial home does not, of course, imply that the law of the place where the marriage is actually celebrated is to be disregarded. That would be impossible. Obviously no system of law can allow the use of its procedure for the contracting of unions which it considers to be void owing to nonage, incest or any other reason. Therefore, the authorities in any country will justifiably forbid the celebration of a marriage if the parties do not possess capacity according to the local law.

*Lex loci
celebra-
tiones
cannot be
disregarded*

Postponing for a moment a consideration of the actual decisions, the question may now be asked—What are the respective merits of the two rival doctrines?

Evaluation
of the two
views

¹ Mr. Sykes in 4 *I. & C.L.Q.R.* 167 is scarcely correct in his criticism that the doctrine makes everything turn upon *expressed* intention. He seems to have overlooked the requirement that the parties must have carried their intention out.

(i) Socio-
logical
grounds

It is submitted that on sociological grounds the doctrine of the dual domicile is inferior to that of the intended matrimonial home. Marriage is an institution which closely concerns the public policy and the social morality of the State. In the words of Lord Penzance:

‘It confers a status on the parties to it and upon the children that issue from it. Though entered into by individuals it has a public character. It is the basis upon which the framework of civilized society is built; and as such is subject in all countries to general laws which dictate and control its obligations and incidents, independently of the volition of those who enter upon it.’¹

The general laws which dictate its incidents, however, vary not inconsiderably in different countries, and where a woman domiciled in one country marries a man domiciled in another the question naturally arises—Which State is to control the incident of capacity? Which State is in the nature of things entitled to demand pre-eminent consideration for its code of social morality? The obvious answer would seem to be—the State in which the parties set up their home.

A rule for the choice of law, such as that imposed by the dual domicile doctrine, commands little respect if it is framed without regard to its impact upon the social life of the community that will be most intimately affected by its operation. It seems reasonably clear that whether the intermarriage of two persons should be prohibited for social, religious, eugenic or other like reasons is a question that pre-eminently, if not exclusively, affects the community in which the parties live together as man and wife. Dealing with the case where the wife takes up her residence in the State in which the husband had his pre-marriage domicile, an acute American commentator has summarized the position in these words:

‘It seems almost too clear for argument that the law of that State ought to be applied in determining the capacity to marry, since that State is the only one actually concerned socially with the marital status of the two people involved.’²

It is the law there in force which more than any other law is entitled to pass judgment upon the propriety or impropriety of the union. To take even the extreme case of an absolute incapacity, if an English girl fifteen and a half years of age, contrary to the law of England, marries a foreigner domiciled

¹ *Mordaunt v. Mordaunt* (1870), L.R. 2 P. & D. 103, 126.

² Cook, *Logical and Legal Bases of Conflict of Laws*, p. 448.

in a country whose law permits marriage at this early age, it may be doubted whether it is justifiable to regard the union as void. The social life of England is unaffected, for the girl proposes to sever her connexion with this country. It has, indeed, been objected that this is to minimize the value that the girl possesses in her pre-nuptial domicil. It is alleged that 'an unmarried woman is without question of value to the State in which she lives, of which she is a useful citizen, and to the social and economic resources of which she may contribute as a worker, as a householder, as a tax or rate-payer; and ultimately, if married to a domiciliary of that state, as a mother'.¹ To this it may be answered that paternal government, though tiresome, is bearable if kept within reasonable bounds, but that to treat a female subject, not as a person whose happiness deserves promotion, but as an economic and fecund asset to be retained at all costs, represents a somewhat tiresome philosophy of life.

Apart from sociological considerations, principle alone seems to demand that where the parties are domiciled in different countries before their marriage questions of the essential validity of the union, including their personal capacity, should be governed by the law of the place where they establish their joint home. This is not incompatible with legal doctrine.² A close analogy is to be found in the rules for the choice of law concerning contracts in general. Here the rule is that capacity is governed by the law of the country with which in fact the contract has the most substantial connexion.³ Moreover, if performance is to occur wholly in a country different from that in which the contract was made, it is normally the law of the place of performance that governs. The identity of the country with which the contract to marry is most substantially connected or in which it is to be performed admits of no doubt.

'A connection,' said Lord Brougham many years ago, 'formed for cohabitation, for mutual comfort, protection and endearment, appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises, and perform those duties which were the objects of the union; in a word their domicil.'⁴

¹ Graveson, *Journal of Comparative Legislation and International Law*, vol. xx, Part I, p. 62.

² See *ibid.*, at pp. 60 et seqq.

³ *Supra*, p. 223.

⁴ *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 536. It has, indeed, been suggested by Mr. Sykes that the appropriate law to govern the essential validity

Dealing with the normal case, where the wife moves to the domicile of her husband, Savigny expresses the true doctrine with considerable force.¹

‘There is no doubt’, he says, ‘as to the true seat of the marriage relation; it must be presumed to be at the domicile of the husband, who, according to the laws of all nations and of all times, must be recognized as the head of the family. For this reason, too, the territorial law of every marriage must be fixed according to it; and the place away from the domicile where the marriage may be celebrated is quite immaterial.’²

‘Many doubt this last proposition, because they regard marriage as an obligatory contract, but are accustomed in such contracts to regard the place where they are made as determining the local law. The first of these two views is false, because marriage has nothing in common with the obligatory contracts. If, however, it were true, it would not lead us to the place where the marriage originated as the criterion of the local law, but rather to the place of performance. But assuredly it is only the domicile of the husband that can be the place of the performance of the duties arising from marriage.’³

‘From this standpoint a number of legal questions in regard to marriage are to be examined.

‘1. The conditions of the possibility of marriage, or (viewed from the other side) the impediments to marriage, are founded partly on the personal qualities of each of the two spouses separately, partly on their relation to one another. According to general principles, it may be supposed that the personal capacity of the wife is to be judged according to the law of her home. But the laws that here come into operation rest on moral considerations, and have a strictly positive nature; and therefore the hindrances to marriage which are recognized in the domicile of the husband are absolutely binding, without respect to the differences which may exist at the home of the wife, or at the place where the marriage is celebrated. This rule holds, in particular, in regard to the forbidden degrees, and the obstacles founded on religious vows.’

(iii) As a practical working rule the dual domicile doctrine is
 Grounds of effective-ness illusory, since in the case of a relative incapacity it can be avoided by the woman if she changes her domicile prior to the marriage ceremony. One apparent object of the rule is to impose upon a woman domiciled, say, in England the English rules relating to the prohibited degrees. She is not *inter alia* to marry

of a marriage, including the capacity of the parties, is the proper law of the contract to marry, i.e. ‘the law of that country with which the contract has the most real connexion’; 4 *I. & C.L.Q.R.* 168. Surely, this is only another way of expressing the doctrine of the intended matrimonial domicile.

¹ *Private International Law*, Guthrie’s translation, s. 379, p. 240.

² But see *supra*, p. 307.

³ To the same effect see Huber, *De Conflictu Legum*, s. 10.

the man from whom her sister has been divorced, though he may be domiciled in a country where the union is lawful. Such may be the design of the doctrine, but such is not necessarily the result. If the marriage is celebrated in England or in some country other than that in which the parties intend to live, i.e. at a time when she still possesses an English domicil, the object of the doctrine is achieved, for the marriage is void. But the woman, if well advised, will adopt different tactics. As we have seen, the briefest residence in a country constitutes domicil if it is intended to be permanent.¹ The emigrant acquires an Australian domicil the moment that he sets foot on shore at Sydney. Therefore the way of escape from an unpleasant situation open to our hypothetical Englishwoman is to marry, not in England, but in her fiancé's country. Immediately upon her arrival there with the undeniable intention of remaining there for the remainder of her married life, her English domicil will be lost and her marriage will be valid even according to the dual domicil doctrine. It is difficult to feel enthusiasm for a doctrine under which the all-important question of marital status can be affected by tactics of this description. One of the arguments advanced in its favour is that 'the incidence of status cannot be affected by the intention of the parties',² but this, though generally true, seems in the present connexion a little out of touch with realities. By contrast, the doctrine of the intended matrimonial home, whatever its other defects may be, is at any rate not open to evasion.

The conclusion is that the rival claims of the two doctrines must stand or fall by the answer to the simple question—Should the law of the country where the parties live together as husband and wife in accordance with their pre-marriage intention be allowed to determine once and for all whether they possess the status of married persons? It is submitted that this purely sociological question should be answered affirmatively. Several objections of a practical nature may, no doubt, be advanced against this view. But this is true of any particular rule, for an ingenious mind can always suggest circumstances in which its application will be difficult or its operation unfair. Suppose, for instance, that the parties do not in fact establish their matrimonial home in the country intended by them at the time of the marriage. Or suppose that at the time of the marriage they have not chosen the country of their future residence. Or suppose that they change their minds after the

Conclusion

¹ *Supra*, p. 169.

² Dicey, p. 761.

marriage. Does the question of their status, ask the critics, remain undecided? These objections, however, largely disappear if it is remembered that where the intention of the parties is debatable the *lex domicilii* of the husband at the time of the marriage must prevail. In the majority of cases it is in that domicile that the parties intend to settle and do in fact settle. In the exceptional case where they determine to make their home in the wife's domicile or in some third country, there is no practical objection to allowing the law of their chosen country to govern their status, always provided, however, that their intention is proved by convincing evidence and is in fact implemented.

Views of the Royal Commission on Marriage and Divorce
 Moreover, as we have seen, the question whether a marriage is void for want of capacity generally arises in a suit for nullity at a time when there is no difficulty in identifying the matrimonial domicile. The Royal Commission on Marriage and Divorce, at any rate, was not impressed by the alleged practical difficulties, for it proposed that the draft code upon the private international law of matrimonial causes should contain the following provision in the section dealing with the jurisdiction of the English court to annul a marriage alleged to be void:

'If the marriage is alleged to be void on a ground other than that of lack of formalities, that issue shall be determined in accordance with the personal law or laws of the parties at the time of the marriage (so that the marriage shall be declared null and void if it is invalid by the personal law of one or other or both of the parties); provided that a marriage which was celebrated elsewhere than in England or Scotland shall not be declared void if it is valid according to the law of the country in which the parties intended at the time of the marriage to make their matrimonial home and such intention has in fact been carried out.'¹

Relevant decisions compatible with doctrine of matrimonial domicile
 2. *The rule as deducible from the English decisions.* We must now discard theory and ascertain whether there is judicial authority in England for the view that capacity to marry is governed, not by the pre-marriage *lex domicilii* of each party, but by the law of the intended matrimonial home. The relevant decisions,² it is submitted, are compatible with the view that whether a marriage is void on the ground that it is definitely prohibited by one or more of the legal systems affecting

¹ Cmd. 9678, p. 395. For the commentary on this proposal see *ibid.*, at pp. 234-5.

² *Mette v. Mette* (1859), 1 Sw. & Tr. 416; *Brook v. Brook* (1861), 9 H.L.C. 193; *Sottomayor v. De Barros* (No. 1) (1877), 3 P.D. 1; (No. 2) (1879), 5 P.D. 94; *In re Bozzelli*, [1902] 1 Ch. 751; *In re De Wilton*, [1900] 2 Ch. 481; *In re Paine*, [1940] Ch. 46; *Pugh v. Pugh*, [1951] P. 482, 680.

the parties, must be decided in accordance with the law of the matrimonial home. It will be seen that in each case the decision would have been the same had it been squarely based upon the exclusive application of the law of the matrimonial home. Also, that in only one of the judgments is express and clear approval given to the dual domicil doctrine.¹

In *Brook v. Brook*,² the case so confidently cited by those who refer capacity to the respective personal laws of the parties, the facts were these: *Brook v. Brook*

A marriage was celebrated in Denmark between a domiciled Englishman and his deceased wife's sister also domiciled in England, such marriage being legal by Danish law, but illegal at that date (1850) by English law.

The House of Lords held that the marriage was void, since its validity must be determined by English law which was the *lex domicilii* of the parties. We must not, however, be misled into thinking that by this the court regarded the *lex domicilii* of *each* party before marriage as a relevant factor. A careful reading of the speeches seems to show that English law was chosen, not because it was the *lex domicilii* of each party before marriage, but because England was the country in which they both intended to retain, and did in fact retain, their former domicils. Thus Lord Campbell stated the position as follows:

‘But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the marriage depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated.’³ . . .

‘But I am by no means prepared to say, that the marriage now in question ought to be or would be held valid in the Danish courts, proof being given that the parties were British subjects domiciled in England, that England was to be their matrimonial residence, and that by the law of England such a marriage is prohibited. The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties are domiciled and *mean to reside*, the consequence seems to follow that by this law must its validity or invalidity be determined.’⁴

More important are the remarks which Lord Campbell made about *Warrender v. Warrender*,⁵ for that was a case where *Lord Campbell's view.*

¹ *In re Paine, infra*, p. 315.

³ At p. 207, *per* Lord Campbell.

⁵ (1835), 2 Cl. & F. 488.

² (1861), 9 H.L.C. 193.

⁴ At p. 213, *per* Lord Campbell.

a domiciled Scotsman had married a domiciled Englishwoman in England, with the intention, however, of establishing his matrimonial residence in Scotland. The case, which was concerned with the effectiveness of a Scottish divorce, raised no question of capacity, but the conclusion forced upon one after reading the following passage is that Lord Campbell regarded the law of the matrimonial home as the determining factor in all matters relating to marriage except formalities. He said:

‘But your Lordships unanimously held that as Sir George Warrender at the time of his marriage was a domiciled Scotchman, and *Scotland was to be the conjugal residence* of the married couple, although the law of England where the marriage was celebrated regulated the ceremonials of entering into the contract, the essentials of the contract were to be regulated by the law of Scotland. . . .’¹

Decisions to the same effect as that in *Brook v. Brook* were given in the next group of cases, namely, *Sottomayor v. De Barros* (No. 1);² *In re De Wilton*;³ and *In re Bozzelli*.⁴ In each of these cases the parties had a common pre-marriage domicile, and in each that domicile was the one in which, in accordance with the intention of the parties, the matrimonial home was established. In fact the Court of Appeal in the *Sottomayor Case* expressly said that their decision must not be relied upon as an authority for a case where the parties had different domicils.

*Mette v. Mette*⁵ is the earliest decision on this matter in which the parties were domiciled in different countries prior to their marriage.

A domiciled Englishman contracted a marriage in Frankfort with his deceased wife’s half-sister, a domiciled German woman. This marriage, prohibited by English law but valid by German law, was held to be void.

This decision is, in fact, in accord with the view that we are advocating. The man was domiciled in England until his death, both parties contemplated a matrimonial residence in England, and therefore English law, as being the law of the matrimonial home, was the appropriate legal system to determine the matter. In the words of the judge, the husband ‘remained domiciled in this country, and the marriage was with a view to subsequent residence in this country’. Nevertheless, although the result reached is in accord with the present submission, the *ratio decidendi* is perhaps a little doubtful. After remarking that

¹ At p. 212.

² (1877), 3 P.D. 1.

³ [1900] 2 Ch. 481.

⁴ [1902] 1 Ch. 751.

⁵ (1859), 1 Sw. & Tr. 416.

'there could be no valid contract unless each was competent to contract with the other', words which suggest a preference for the dual domicile doctrine, Sir Cresswell Cresswell finally concluded that since the husband had remained domiciled in England, and the marriage was with a view to subsequent residence there, the English prohibition was necessarily operative.¹

The next case on the subject is *In re Paine*, the facts of which have already been given.² Bennett J. expressly decided it on the basis of the dual domicile doctrine, but the result was exactly what it would have been had he applied the doctrine of the matrimonial home. Since England was the country where the wife was domiciled, where the man was resident before the marriage, where they intended to reside together and where in fact they resided throughout their married lives, the decision that English law must prevail could scarcely have been different.

The only case which has raised the question of absolute capacity is *Pugh v. Pugh*,³ where the facts were these: *Pugh v. Pugh*

A British officer, domiciled in England but stationed in Austria, married a Hungarian girl in Austria in 1946. The girl, whose domicile of origin was Hungarian, had gone to Austria with her parents to escape from the Russian advance. She was only fifteen years of age and therefore, if her capacity was to be governed by English domestic law, the marriage was rendered void by the Age of Marriage Act which prohibits a marriage 'between persons either of whom is under the age of sixteen'. By both Hungarian and Austrian law the marriage was valid.

The wife submitted that the marriage was void for want of capacity, first because the husband was a British subject with an English domicile and therefore bound by the Act; secondly and alternatively, because the essential validity of the marriage was determinable by English law as being either the *lex domicilii* of the husband or the law of the country of the proposed matrimonial home. Pearce J. granted a decree of nullity, holding that the wife was entitled to succeed on both submissions. The Act, he said, was intended to affect 'all persons domiciled in the United Kingdom wherever the marriage

¹ 1 Sw. & Tr. at pp. 423, 424.

² [1940] Ch. 46, *supra*, p. 306. This decision is at first sight difficult to reconcile with that of Romer J. in *re Bischoffsheim v. Bischoffsheim*, [1948] Ch. 79, *infra*, p. 399, where, however, the question of the legitimacy of the children was held not to depend upon the validity of their parents' marriage.

³ [1951] P. 482.

might be celebrated'.¹ He also agreed with the second submission, 'since by the law of the husband's domicile it was a marriage into which he could not lawfully enter'.² This passage, coupled with the citation of *In re Paine*,³ undoubtedly suggests that the learned judge applied English law as being the *lex domicilii* of the husband before marriage, but the fact remains that the decision is compatible with the doctrine of the intended matrimonial domicile.

'At all the material times it was the husband's intention after his service abroad to settle down with his wife in England. On October 10th, 1948, a child was born. In June, 1950, they paid a short visit to England, and in October, 1950, they came to England permanently.'⁴

Sottomayor
v. De Bar-
ros (No. 2)

It may be objected with force that none of these decisions is conclusive in favour of the law of the matrimonial home, since each one is open to the construction that the *lex domicilii* referred to was the *lex domicilii* of each party. In fact it must be admitted that in *In re Paine* the judge did not address his mind to the future matrimonial home, but applied English law as being the *lex domicilii* of the woman prior to her marriage. Nevertheless there remains one decision which, on the facts though not on the reasoning, is a more convincing authority for the view now being advocated. This is *Sottomayor v. De Barros* (No. 2),⁵ where

a domiciled Englishman married in England his first cousin, a domiciled Portuguese. The law of Portugal prohibited a marriage between first cousins in the absence of a Papal dispensation.

If it is true to say that a marriage is invalid where either party is incapacitated by his or her personal law, the decision in this case should have been adverse to the legality of the union, but Sir James Hannen held that it constituted a valid marriage. It must be admitted that he did not base his decision upon the matrimonial residence of the parties in England, but upon the fact that the *lex loci celebrationis* was English. Impressed by the 'injustice which might be caused to our own subjects if a marriage were declared invalid on the ground that it was forbidden by the law of the domicile of one of the parties',⁶ he refused to give effect to the prohibition imposed upon the wife by Portuguese law. The decision has never been overruled.

¹ [1951] P. 493.

³ *Supra*, p. 306.

⁵ (1879), 5 P.D. 94. See also *Ogden v. Ogden* [1908] P. 46.

⁶ *Ibid.*, at p. 104.

² *Ibid.*, at p. 494.

⁴ [1951] P., at pp. 482-3.

How, then, is it to be rendered compatible with the dual domicil doctrine? The difficulty is usually surmounted by framing an exception to that doctrine. It is stated as follows in the leading text-book:

‘The validity of a marriage celebrated in England between persons of whom one has an English, and the other a foreign, domicile is not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England.’¹

In other words, capacity must be tested by the *lex domicilii* of each party, but when one of them has an English domicil a foreign incapacity affecting the other and unknown to English law must be utterly disregarded if the marriage takes place in England. This suggested rule has been stigmatized as ‘unworthy of a place in a respectable system of the conflict of Laws’.² What is equally true is that it makes nonsense of the dual domicil doctrine.

Risk v. Risk,³ the most recent authority that can claim to be relevant, was concerned with the validity of a marriage between a woman whose English *lex domicilii* recognized only monogamy and a Moslem domiciled in Egypt, where polygamy is recognized. Risk v. Risk

Barnard J. was far from saying that the marriage was void. His actual decision was that he lacked jurisdiction to entertain the wife’s petition for nullity, but it is evident from the words which have already been cited in another context⁴ that in his view it did not lie in her mouth to allege the invalidity of the marriage. Yet, if the dual domicil doctrine is correct, the obvious course would have been to declare the marriage void for want of capacity.

What, then, is the effect of these authorities? We have seen that in each one it was a matter of indifference to the actual result which of the two rival doctrines was applied, except in *Risk v. Risk*, where the dual domicil doctrine was ignored. We have also seen that in *Mette v. Mette*⁵ that doctrine was expressly recognized, but that in *Brook v. Brook* before the House of Lords the doctrine of the matrimonial home may have been the basis of the decision.⁶ Which of these doctrines represents the What is the effect of the decisions?

¹ Dicey, p. 784. In addition to *Sottomayor v. De Barros* (No. 2) (1879), 5 P.D. 94, the exception is supported by dicta, *Chetti v. Chetti*, [1909] P. 67, 81–88; *Ogden v. Ogden*, [1908] P. 46, 74–77.

² Falconbridge, *Conflict of Laws*, p. 711.

³ [1951] P. 50.

⁴ *Supra*, pp. 302–3.

⁵ *Mette v. Mette*, *supra*, p. 314; *In re Paine*, *supra*, p. 306. ⁶ *Supra*, p. 313.

law? We have suggested various reasons for preferring the latter, but that is of little consequence compared with the interpretation that the Court of Appeal is likely to put upon the decisions.

So-called
incapacities
raise the
question of
essential
validity

Before attempting this forecast, it will be helpful to analyse the nature of the so-called incapacities that have occupied the attention of the courts, for this will disclose the particular aspect of the marriage contract that is affected and the proper law to which they are subject. All the relevant cases, except *Pugh v. Pugh*, have been concerned with prohibited marriages, and in the present account they have been discussed on the basis of capacity. Foote was of opinion that 'the only logical incapacities which exist in English law are those occasioned by infancy and insanity',¹ and he expressed the view, shared by the Court of Appeal,² that it is a misuse of language to regard the universal prohibition of an act as the imposition of an incapacity. He illustrated his view as follows:

'Where a deprivation or a prohibition is general in its effect, it imposes no incapacity upon any one. It does, however, occasionally happen that a prohibition, which is in reality universal, is apparently particular; and that a man is prohibited from a complex act which seems at first sight to be one permissible to others. For example, *A* (before the Act of 1907) wished to marry *B*, his deceased wife's sister, but the English law prohibited him from doing so. Inasmuch as *C*, *D*, *E*, &c., might marry *B*, if they and she liked, *A* may be said in a certain loose sense of the term, to have been incapacitated by English law from that act. Strictly speaking, this is incorrect. Marriage with a deceased wife's sister, the act in *A*'s mind, was *universally* prohibited by English law, and neither *A* nor anybody else might do it. It is true that any other man not similarly related to her might marry *B*, but if any other man married her, he would not be doing that prohibited act which *A* desired to do. *A*'s capacity, therefore, was not in any way affected by the prohibition.'³

If this view is correct, as it appears to be,⁴ the so-called relative incapacities affect the legality or the essential validity of a marriage, and it was on this footing that the House of Lords decided *Brook v. Brook*. In that case Lord Campbell expressly said that his opinion did 'not rest on the notion of any personal incapacity to contract such a marriage', but 'on the ground of the marriage being prohibited in England as contrary to

¹ *Private International Law* (5th ed.), p. 383.

² *Ogden v. Ogden*, [1908], P. 46, at p. 74.

³ *Private International Law*, p. 100.

⁴ But see *contra*, 46 L.Q.R. 305, note 100.

God's law';¹ and in none of the speeches does the word 'capacity' once occur. Indeed, even if Foote's analysis is unsound, it seems obvious that capacity can only be classified as going to the essence of the marriage contract. In any event, therefore, the law that governs the essential validity of a marriage must also govern *inter alia* the question whether a marriage between *X* and *Y* is permissible, for it can scarcely be the case that certain elements of essential validity are governed by one law, but others by a different law.

Thus the question canvassed in the present discussion may be stated perhaps more accurately by asking—What law governs the essential validity of a marriage? The answer, no doubt, is the law of the domicil, but as we have suggested it is not certain whether this refers to the matrimonial domicil or to the domicil of each party before marriage. Foote himself felt no doubt. 'Inasmuch as the wife's domicil becomes the husband's upon the marriage, it is the law of his domicil, not hers, which must in all cases be looked to. This appears a necessary conclusion, but there is no express decision.'² There is still no explicit decision, but there are judicial pronouncements of high authority in recent years which refer the legality or illegality of a marriage to the law of the matrimonial domicil.

What law governs essential validity?

In the first of these, *De Reneville v. De Reneville*,³ the Court of Appeal held that the essential validity of a marriage between a woman domiciled in England and a man domiciled in France, the parties having spent their married lives in French territory, fell to be governed by French law. If French law was chosen as being the law of the matrimonial home, the decision goes a long way towards supporting the contention put forward in these pages, for it cannot be doubted that capacity to marry raises a question of essential validity. The wife had petitioned the English court for a decree of nullity on the ground of the

Lord Greene

¹ (1861) 9 H.L.C. 193, 214.

² *Private International Law* (5th ed.), p. 384, note *p*. The summary appended to the 4th edition, which did not appear in the later edition, put the matter thus at p. 567:

'In the contract of marriage, the question, strictly speaking, is generally not one of the capacity or incapacity of the parties, but of the legality or illegality of the marriage.'

'The law of the matrimonial domicil is the proper law to decide whether the marriage can, by the use of any forms, ceremonies or preliminaries, be effected.'

³ [1948] P. 100. See also a similar statement by Bucknill L.J. in *Casey v. Casey*, [1949] P. 420, at pp. 429-30.

impotence of her husband, and in the passage that follows Lord Greene was concerned to ascertain the law that determined whether the alleged defect of impotence rendered the marriage void or voidable. He said:

'In my opinion the question whether the marriage is void or merely voidable is for French law to answer. My reasons are as follows: The validity of a marriage so far as regards the observance of formalities is a matter for the *lex loci celebrationis*. But this¹ is not a case of forms. It is a case of essential validity. By what law is that to be decided? In my opinion by the law of France, either because that is the law of the husband's domicile at the date of the marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage.'²

Denning L.J. The second judgment which shows a similar trend is that of Denning L.J. in *Kenward v. Kenward*,³ where he affirmed with no ambiguity that the 'substantial validity' of a marriage contracted between persons domiciled in different countries is governed by the law of the country where they intend to live and on the basis of which they have agreed to marry.

Conclusion The justifiable inference, therefore, is that if the Court of Appeal has occasion to determine the capacity for inter-marriage of parties domiciled in different countries, it will prefer the reasoning of Lord Campbell⁴ and will assign the question to the law of the intended matrimonial home.

III. FORMALITIES OF MARRIAGE

Formal validity depends solely upon *lex loci celebrationis* There is no rule more firmly established in private international law than that which applies the maxim *locus regit actum* to the formalities of a marriage. Whether any particular ceremony constitutes marriage depends solely upon the law of the country where the ceremony takes place.⁵ Thus, if a woman,

¹ i.e. the effect on the marriage of the impotence of one of the parties, see *infra*, pp. 356-7.

² [1948] P. 100, at p. 114.

³ [1951] P. 124, 143-6; *supra*, pp. 301-2, for a full citation of his view.

⁴ *Supra*, p. 313.

⁵ *Scrimshire v. Scrimshire* (1752), 2 Hag. Con. 395; *Dalrymple v. Dalrymple* (1811), 2 Hag. Con. 54; *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 530; *Harvey v. Farnie* (1882), 8 App. Cas. 43, 50; *Berthiaume v. Dastous*, [1930] A.C. 79 (P.C.); *Kenward v. Kenward*, [1951] P. 124. As to the method of proving a foreign marriage in English proceedings, see the Practice Direction in 1955, 1 W.L.R. 668.

domiciled and resident in England, executes a power of attorney appointing *X* to act as her representative in the celebration of a marriage between her and *Y* in a country where marriage by proxy is recognized, and the ceremony in fact takes place, the formal validity of the union cannot be impugned.¹ The celebration of a marriage by proxy is a matter of the form of the ceremony or proceeding, and not an essential of the marriage.²

'If a marriage is good by the laws of the country where it is effected, it is good all the world over,³ no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage.'⁴

The first case to establish this principle in England was *Scrimshire v. Scrimshire*⁵ in 1752, where the facts were as follows:

Two British subjects, both domiciled in England, married each other in France. The husband was eighteen, the wife fifteen, years of age; the marriage was clandestine and by French law absolutely void, but was valid by English law unless avoided as the result of legal proceedings. The marriage was annulled by a French court. The wife later brought a suit for restitution of conjugal rights. It thus became necessary to decide whether there was a subsisting marriage or not, and this, of course, depended upon whether the legal effect of the ceremony was to be determined by French or by English law.

It was urged that, since both parties were British subjects domiciled in England, the law of France had no claim to be considered. The judge of the Consistory Court, Sir Edward Simpson, had no difficulty in disposing of this argument. The parties, by electing to celebrate their marriage in France, had subjected themselves to the marriage law of that country, so far as form was concerned, and if the rule *locus regit actum* were to be ignored the highly inconvenient result would ensue that their status would be one thing in France, another in England.

¹ *Apt v. Apt*, [1948] P. 83.

² *Ibid.*, at p. 85.

³ All that this means is that a marriage good as to *form* is formally valid all the world over. A marriage good as to form where solemnized, but void as to essentials by the personal law, is not universally valid.

⁴ *Berthiaume v. Dastous*, *supra*, at p. 83.

⁵ (1752), 2 Hag. Con. 395.

Retro-
spective
validation
of
marriage If a marriage which is formally void because solemnized by a defective ceremony is later validated by the *lex loci celebrationis*, it will be recognized as valid in England. This position arose in *Starkowski v. A.-G.*¹ where the facts were as follows:

In May, 1945, *H* and *W*, both domiciled in Poland, went through a ceremony of marriage in a Roman Catholic church in Austria, though at that time Austrian law required a civil ceremony in accordance with the German Marriage Law of 1938. In June, 1945, after the expulsion of the Germans, a special law was passed providing that such religious marriages should be retrospectively validated if they were registered in the appropriate public register. The ceremony between *H* and *W* was duly registered, though without the knowledge of *W*.

W came to England in 1946, acquired an English domicile² and formed a connexion with *X* by whom she had a child. In 1950 she and *X* went through a ceremony of marriage at Croydon.

The question was whether the Austrian marriage was valid and subsisting at the time of the Croydon ceremony, for if so there was no subsequent marriage with *X* that would suffice to legitimate their child.

It was argued on behalf of the child that the validity of a marriage must be tested according to the relevant law at the time of the ceremony; further, that foreign retrospective legislation is repugnant to English public policy and that to recognize the Austrian validating law in the instant circumstances would be to alter the status of a person domiciled in England. Despite these weighty arguments, the House of Lords held the Austrian marriage to be valid and the child born to *W* and *X* to be illegitimate, though their Lordships expressly refrained from suggesting what their decision would have been had the English marriage been concluded before the Austrian legislation or before the registration. Adverting to the governing principle—*locus regit actum*—Lord Asquith said:

'I can see no material distinction in this regard between the observance, as between the parties, of formalities which suffice to make a marriage valid *ab initio* according to the local law, and of formalities which are not so sufficient but the insufficiency of which is (almost immediately in this case) repaired by a validating Act of' the local legislature.³

Logically, what is true of validating legislation should be

¹ [1954] A.C. 155; compare *Pilinski v. Pilinska*, [1955] 1 W.L.R. 329. See 3 *J. & C.L.Q.R.* 353.

² This finding was on the assumption that she was a *feme sole*.

³ At p. 177.

equally true of invalidating legislation, but it is to be hoped that this is one of the many cases in which English law will pay no regard to logic.

This principle, that a marriage which is in accordance with the formalities of the *lex loci celebrationis* is to be regarded as formally valid everywhere, even though it would have been void if solemnized in that manner in the country where one or both of the parties are domiciled, is generally but not universally accepted. Thus in those countries where status depends upon religious law, as in Yugoslavia and Greece for persons of the Orthodox faith, in Malta for Roman Catholics, and in Cyprus for Moslems and members of the Orthodox Church, a marriage contracted in disregard of the religious formalities of the domicil, no matter where solemnized, is not recognized as valid. For instance, a civil marriage contracted in London by a Roman Catholic domiciled in Malta is not recognized by Maltese law. It is clear, however, by English law that foreign views of this nature do not disturb the application of the maxim—*locus regit actum*. In practice the parties avoid the unfortunate situation that arises from this conflict of laws by the performance of two separate ceremonies, one according to the local forms, the other according to the religious requirements.

Predominance of *lex loci celebrationis* not admitted in all countries

So imperative is it that the *lex loci celebrationis* should alone determine whether the formalities of a marriage are sufficient, that no exception is made to the principle even where the sole object of the parties in marrying in a foreign country has been to evade some troublesome formal requirement of their *lex domicilii*.¹ The leading authority upon the matter is *Simonin v. Mallac*.²

Lex loci governs even though formalities of *lex domicilii* evaded

Two domiciled French persons contracted a marriage in London which, though valid according to English law, would have been void if tested by French law, since the parental consent required by the Code Napoléon had not been obtained. The wife later petitioned for a decree of nullity of marriage.

The court dismissed the petition, for since the necessary consent, as we have seen,³ was a formality required by French law and nothing more, its absence could not affect a marriage contracted in England. The Judge Ordinary, in delivering the unanimous judgment of the court, could discover no judicial

¹ The *Gretna Green Cases*, *supra*, p. 58, note 1.

² (1860), 2 Sw. & Tr. 67.

³ *Supra*, p. 57.

decision or dictum, no opinion among writers of authority, which controverted the principle that in all circumstances the law of the country where a marriage is solemnized shall alone govern its formal validity. So the fact that a person is disabled by his foreign *lex domicilii* from marrying otherwise than in accordance with the formalities of that law will not be held by the English courts to invalidate a marriage contracted by him in England according to English law.¹

Exceptions to the principle
locus regit actum
There are, however, certain exceptional cases in which English law recognizes the validity of a marriage, notwithstanding a failure to observe the formalities of the *lex loci celebrationis*. These exceptions to the general principle may be grouped as follows.

(i) *Marriages under the Foreign Marriage Acts, 1892 to 1947.*

Foreign Marriage Act
The Foreign Marriage Act, 1892, provides that a marriage between parties, one of whom at least is a British subject,² solemnized before a 'marriage officer' in a foreign country in the manner prescribed by the Act, shall be as valid as if it had been solemnized in the United Kingdom with a due observance of all forms required by law.³ The persons who may be appointed marriage officers include British Ambassadors, Governors, High Commissioners, and Consuls.⁴

It is essential that one at least of the parties should reside for a minimum period of one week within the district of the marriage officer by or before whom the ceremony is to be solemnized, and also that after this period of residence a notice containing certain particulars should be given to the officer.⁵ If only one party has satisfied this condition of residence, the other must give a notice in the same terms to the appropriate officer in the place where he or she has dwelt.⁶ The notice must be posted up by the marriage officer in some conspicuous place during fourteen consecutive days, at the end of which period, if no caveat has been lodged, the marriage may be solemnized.⁷

¹ *Papadopoulos v. Papadopoulos*, [1930] P. 55; *Chetti v. Chetti*, [1909] P. 67.

² The Act, therefore, does not extend to a British-protected person, e.g. natives of British protectorates; of protected States; of Indian States; or of mandated territories.

³ S. 1.

⁴ S. 11.

⁵ S. 2. The particulars are the name, surname, age, profession, condition and residence of each party.

⁶ Foreign Marriages Order in Council, S.R. & O., 1913, No. 1270, Arts. 7-14, as varied by S.R. & O., 1925, No. 92, Art. 1, and by S.R. & O., 1933, No. 975, Art. 1.

⁷ Foreign Marriage Act, 1892, ss. 3, 5.

Every marriage must be solemnized at the official house of the marriage officer, with open doors, in the presence of two or more witnesses. The ceremony, which may be performed either by the marriage officer or by some other person in his presence, may be according to the rites of the Church of England or in such other form as the parties see fit to adopt.¹ If, however, the rites of the Church of England are not observed, each party must make at some stage of the ceremony the following declaration:

‘I call upon these persons here present to witness, that I, *AB*, take thee, *CD*, to be my lawful wedded wife (or husband).’²

A marriage contracted under these statutory provisions is necessarily valid in England from the point of view of form, though it may be void under the law of the country where it took place.³ If, however, it is annulled in the country of the common domicil of the parties, the decree of nullity is effective in England.⁴

Regulations have, however, been made by Order in Council, in order to minimize the risk of a marriage being void in the foreign country and valid in England.⁵ Thus a marriage officer is forbidden to perform a marriage that will be invalid by the local law of the foreign country unless he is satisfied that both parties are British subjects, or, if one only is a British subject, that the other is not a citizen of that country. If such other party is a citizen of the foreign country, the marriage officer must satisfy himself that there are not sufficient local facilities for celebrating the marriage, or, if the citizen is the woman, that the national authorities will not object to the marriage. Again, where the woman about to be married is a British subject and the man an alien, the marriage officer, before allowing the ceremony, must satisfy himself:

- (a) that the marriage will be recognized by the law of the foreign country to which the man belongs; or
- (b) that some other and additional marriage ceremony, recognized by the law of the country to which the man belongs, has taken place or is about to take place between the parties; or
- (c) that the leave of the Secretary of State has been obtained.

¹ *Ibid.*, s. 8 (2).

² *Ibid.*, s. 8 (3).

³ *Hay v. Northcote*, [1900] 2 Ch. 262.

⁴ *De Massa v. De Massa*, [1939] 2 All E.R. 150 N; *Galene v. Galene*, [1939] P. 237; *infra*, p. 363.

⁵ S.R. & O. 1913, No. 1270, Arts. 1, 2.

Naval, military, and air force marriages solemnized abroad

Section 22 of the Act of 1892 provided that a marriage solemnized within the British lines by a person officiating under the orders of a commanding officer of a British army serving abroad should be valid. This section caused difficulty in two respects.¹ First, it was doubtful whether marriages were valid that had in fact been frequently solemnized on land by persons officiating under the orders of naval and air force officers. Secondly, the exact meaning of the expression 'British lines' was far from clear. The section, therefore, has now been replaced by the Act of 1947.

The first difficulty has been removed by the enactment that, as respects marriages solemnized before 1 January 1948, section 22 shall be deemed to have had effect as if the words 'British army' included naval and air forces and as if 'British lines' extended to any place at which any part of the military, naval or air forces serving abroad was stationed.²

Next, section 22 is replaced for the future by the following enactment which, it will be noticed, substitutes the expression 'any foreign territory' for 'British lines':

'A marriage solemnized in any foreign territory by a chaplain serving with any part of the naval, military, or air forces of His Majesty serving in that territory or by a person authorized . . . by the commanding officer of any part of those forces serving in that territory shall, subject as hereinafter provided, be as valid in law as if the marriage had been solemnized in the United Kingdom with a due observance of all forms required by law:

Provided that this subsection shall only apply if—

- (a) one at least of the parties to the marriage is a member of the said forces serving in that territory or a person employed in that territory in such other capacity as may be prescribed by Order in Council; and
- (b) such other conditions as may be so prescribed are complied with.'³

'Foreign territory' includes, *inter alia*, ships which are for the time being in the waters of any foreign territory.⁴ A marriage celebrated under the Act is valid whether the armed forces are on active service or merely in the occupation of foreign territory after the successful conclusion of hostilities.⁵

¹ 25 *B.Y.B.I.L.* 390.

² Foreign Marriage Act, 1947, s. 1 (1).

³ *Ibid.*, s. 2. For Orders in Council made under the Act see S.R. & O. 1947, No. 2875 amended by 1949, No. 1235.

⁴ S. 2 (3).

⁵ *Burn v. Farrar* (1819), 2 Hag. Con. 369. By Order in Council the statutory provisions are available to members of the control service in Germany.

A question might arise whether an English court will recognize the validity of a marriage celebrated within the lines of a foreign army while in occupation of another country. This will depend upon whether the law of the country to which the army belongs accepts the doctrine of the 'lines' marriage for its national troops. If so, a marriage satisfying the requirements of the doctrine, whatever they may be, ought to be upheld in England.

Marriage within lines of foreign army

The Act of 1892 is concerned with marriages solemnized abroad *in the English form* between parties, at least one of whom is a British subject. It is not concerned with a marriage solemnized abroad *in the local form* between two British subjects or between a British subject and a foreigner. Yet statutory intervention in such a case is desirable, for, though a marriage contracted abroad in the local form is regarded by English law as formally valid, most foreign governments require a non-national, who desires to marry a national according to the *lex loci*, to produce a certificate of no impediment. The object is to ensure that the marriage will be regarded as valid in all respects by the legal system to which the non-national is subject.

Certificate of no impediment generally required by *lex loci*

The English authorities have for many years, though without statutory authority, met the requirement by issuing certificates that have proved satisfactory to the various countries concerned. The certificates vary slightly in form according to the requirements of the country in question, but a typical example is the *nulla osta* certificate granted to a British subject who proposes to marry in Italy in the Italian form. It is issued by a British consular officer and it reads as follows:

Nulla osta certificate

'*AB* and *CD*, having fulfilled the formalities required by British law, as if their marriage were to be solemnized under that law, I, His Majesty's Consul at Bordighera, upon the evidence before me, hereby certify that no legal impediment to their marriage has been shewn to me to exist.

Given at H.M.'s Consulate,
this day of .'

At least twelve other countries accept certificates couched in the same terms. The formalities upon which the issue of a certificate depend are simple. Notice of the intended marriage must be given to the consul or other marriage officer at the place of residence of the British subject or subjects, and must

remain posted up there for a given period.¹ The certificate is granted at the end of this period, provided that no caveat has been entered, and provided that the parties have affirmed on oath that they know of no impediment to the marriage.

Certificat de coutume A different and more comprehensive type of certificate, generally called a *certificat de coutume*, is issued when the marriage is to be solemnized in France, Belgium, Switzerland or Argentina. In the case of France, for instance, it states that a British subject of the age of twenty-one years may marry without parental or any other consent, and that publication of banns is not required for the marriage of a British subject outside British territory.

Marriage with Foreigners Act, 1906 At the beginning of the present century it was felt that the time had come to put the grant of certificates of no impediment upon a statutory basis, and an attempt to settle this, as well as other cognate matters, was made by the Marriage with Foreigners Act, 1906.² This Act is curiously limited in scope, since it is confined to the case of a marriage between a British subject and a foreigner, and does not extend to the equally common case of a marriage abroad between two British subjects. It provides that a British subject who desires to be married in a foreign country to a foreigner according to the law of that country may give notice of the intended marriage, if resident in the United Kingdom to the Registrar, and if resident abroad to the marriage officer. Application may then be made for a certificate of no impediment that will comply with the requirements of the *lex loci*. It also provides that the forms and regulations appropriate for this purpose shall be settled by Order in Council. In fact, however, the Act has proved completely sterile, for no Order in Council has been made. This failure is due, partly to certain defects in the statutory provisions themselves, and partly to the somewhat rigid manner in which these provisions have been interpreted by the authorities concerned with the drafting of the Order in Council. Matters having thus reached a deadlock, the Lord Chancellor

¹ If the marriage is between two British subjects each party must give notice at the place of his or her residence; one week's residence is sufficient; the notice must remain posted up for fourteen days. These requirements follow the regulations made under the Foreign Marriage Act, 1892. If the marriage is between a British subject and a foreigner three weeks' residence is required, and the notice must remain posted up for three weeks. These longer periods have been taken from the Marriage with Foreigners Act, 1906, which, though in fact abortive, is intended to regulate a marriage between a British subject and a foreigner.

² Sections 1, 3, 4, and schedule.

set up a committee in 1938 to consider this and certain other questions connected with foreign marriages. The committee was instructed *inter alia* to consider:

The form and procedure for the granting of consular certificates of no impediment by British Consuls for the marriage of British subjects or British protected persons by the local law of foreign countries, when such certificates are required by that law, with particular reference to the Marriage with Foreigners Act, 1906.

Unfortunately, however, the deliberations of the committee were brought to an abrupt termination at an early stage by the outbreak of war in 1939.

(ii) *Marriages in a place where there is no local law available.*

It may happen that a British subject desires to marry in a place where there is no local form of marriage, or where, as in the case of Siam, the local form is of a non-Christian nature.

Marriages in remote places are subject to common law

The marriage statutes of the United Kingdom do not, of course, apply to such a case, and the Foreign Marriage Act, 1892, expressly provides that the facilities which it affords are not to abridge other means of contracting marriages. The principle is that where compliance by a British subject with the local forms is impossible the marriage must conform to the requirements of the common law of England. An appreciation of this principle requires an answer to two questions, namely:

- (a) What formalities does common law require for a marriage contracted in England?
- (b) Must all these requirements be observed in the case of a marriage abroad?

With regard to the first question, one essential undoubtedly is that the parties should take each other for man and wife. Another, that an episcopally ordained priest or deacon should take part in the ceremony. This last point was decided by the House of Lords in *R. v. Millis*,¹ where it was held, though in a rather unsatisfactory manner,² that a marriage celebrated in

What is the common law relating to marriage?

¹ (1843-4), 10 Cl. & F. 534.

² The four judges of the Irish Court of Queen's Bench were equally divided, and Perrin J., who had held the marriage valid, formally withdrew his judgment in order that an appeal might be taken to the House of Lords. The case was there argued before six Law Lords and ten judges. A unanimous opinion of all the judges in favour of the invalidity of the marriage was read by Tindal C.J., who explained, however, that lack of time had prevented a proper investigation of the

Ireland by a Presbyterian minister according to the rites of the Presbyterian Church was invalid. Lord Hardwicke's Act did not extend to Ireland, and therefore marriages in that country were governed by the common law. The rule was thus established that no common law marriage is valid without the intervention of an ordained priest. It is a rule that almost certainly lacks historical justification,¹ but its applicability to English common law marriages cannot now be doubted.

Does the
common
law in its
totality
apply
abroad?

The second question is whether the rule in *R. v. Millis* applies to marriages abroad. We must ascertain whether a marriage abroad, in some place where there is no local law available or where the local form is of a non-Christian nature, is formally valid on the ground alone that the parties have taken each other for man and wife, or whether in addition its validity requires the presence of an ordained priest. In other words, how much of the common law affects a British subject in some country outside England? This question of constitutional law has frequently arisen with regard to the early British settlers who carried English law with them to the colonies, and the principle according to which it must be answered is well established, namely, that only so much of the law is imported into the colony as is suitable to the local conditions.² Thus it has been held that the English Statute of Mortmain,³ since it represents a law of local policy adapted solely to this country, does not

case. He said that there had been much difference of opinion and that some of his brethren had felt great difficulty in subscribing to the opinion. The Law Lords were equally divided, and so according to a merely technical rule—*semper prae-sumitur pro negante*—a most important principle was added to the marriage law of England.

¹ Before Lord Hardwicke's Act the practice of the ecclesiastical Courts constituted the marriage law of England. These Courts applied canon law. Before the Decree of the Council of Trent (1545-63) the general canon law of Europe recognized a contract of marriage *per verba de praesenti*, and, since the Decree was never in force in England, it is important to trace the origin of the idea that an English marriage required the presence of a priest. It appears to have originated in a law of the Saxon king, Edmund, of the year 940, to the effect that: 'At nuptials there shall be a mass priest by law who shall by God's blessing bind their union to all posterity.' This was followed by a number of constitutions of bishops and archbishops to the same effect, especially one of Archbishop Lanfranc in 1076. Such constitutions could not create law, and Edmund's decree must have ceased to be law by at any rate the thirteenth century, for after Church and State had been separated by William I the general canon law of Europe was recognized as prevailing in England. The majority of canonists and historians consider the decision in *R. v. Millis* to be wrong.

² Blackstone, i. 100.

³ 9 Geo. II, c. 1.

extend to the Island of Grenada in the West Indies.¹ Tested by this principle, it seems clear that the rule of the common law requiring the intervention of an ordained priest could scarcely be extended to a marriage contracted in a colony during the early days of the colonization when there was no Church establishment and no division of the country into parishes.²

On principle, rule requiring presence of a clergyman does not apply abroad

The weight of judicial opinion was for many years in favour of treating the rule in *R. v. Millis* as being confined to marriages in England and Ireland,³ and in *Catterall v. Catterall*.⁴ Dr. Lushington held that a marriage which had been celebrated at Sydney in 1835 by a Presbyterian minister was valid at common law. He said:

Authority is adverse to extra-territorial application of this rule

'Were I to hold the presence of a priest in the orders of the Church of England to be necessary, I should be going the length of depriving thousands of couples married in the colonies and the East Indies (where till of late years were no chaplains) of the right to resort to this court for such redress as it can give in cases of cruelty or adultery. Until I am controlled by a superior authority, . . . most unquestionably I shall hold in this and all other similar cases that, where there has been a fact of consent between two parties to become man and wife, such is a sufficient marriage to enable me to pronounce, when necessary, a decree of separation.'

If this second rule laid down in *R. v. Millis* is not imported into British territories on the ground that it is unsuited to the local conditions, *a fortiori* it is inapplicable to non-British countries such as China or Siam. Indeed, in *R. v. Millis* itself, Lord Campbell said:

'It has been repeatedly held, and there can be no doubt that such is the law, that in circumstances where it is utterly impossible to procure the presence of a priest, there may be a valid marriage by the consent of the parties.'

This view has now been followed and the matter settled

¹ *A.-G. v. Stewart* (1817), 2 Mer. 143; *Whicker v. Hume* (1858), 7 H.L.C. 124.

² *Maclean v. Cristall* (1849), Perry's Oriental Cases, 75.

³ *Beamish v. Beamish* (1861), 9 H.L.C. 274, 348, 352; *Lightbody v. West* (1903), 18 T.L.R. 526.

⁴ (1847), 1 Rob. Ecc. 580. There was in fact a local marriage statute which had not been observed, but Dr. Lushington had already held in *Catterall v. Sweetman* (1845), 1 Rob. Ecc. 304 that the statute did not avoid all marriages failing to satisfy its requirements.

⁵ 10 Cl. & F. 584, at p. 786.

beyond further doubt by *Wolfenden v. Wolfenden*.¹ In that case:

A Canadian, whose domicil of choice appears to have been English, went through a ceremony of marriage with a Canadian woman in the district of Ichang in the Chinese province of Hupeh. The ceremony was performed, not by an episcopally ordained priest, but by the local minister of the Church of Scotland Mission. The husband petitioned for annulment on the ground that there had been no valid marriage.

Lord Merriman regarded *Catterall v. Catterall* as conclusive, and held that the marriage was formally valid at common law. This decision was approved and followed in *Isaac Penhas v. Tan Soo Eng*,² where a marriage between a Jew and a Chinese woman had been celebrated at Singapore in a somewhat unusual fashion. At the ceremony the man worshipped according to Jewish custom, the woman observed the Chinese rites. Upon proof, however, that the parties had expressed their willingness to take each other as man and wife, the Privy Council held that they had contracted a valid marriage at common law.

Marriages
on the
high seas

There is little authority as to what constitutes a valid marriage solemnized in a merchant ship while on the high seas. The general principle is that the law of the flag governs transactions on board a vessel, for, as Byles J. once said, a British ship is regarded as a floating island on which British law prevails.³ This raises two difficulties in the case of British ships.

First, since there is no one system of law common to all the countries that employ the British flag, which particular legal system constitutes the law of the flag? The alternative seems to lie between English law and the municipal law of the country in which the ship is registered. The latter is the more reasonable rule and the one that is generally advocated.⁴ There would be little justification, for instance, for applying English law to a transaction effected on board a ship registered in New South Wales, owned and administered by persons domiciled in that State, and plying only between ports in the Australian Commonwealth.

Presuming this view to be correct, the second difficulty is to

¹ [1946] P. 61.

² [1953] A.C. 304.

³ *R. v. Anderson* (1868), L.R. 1 C.C.R. 161, 168; but see *R. v. Carr* (1882), 10 Q.B.D. at p. 85; 17 L.Q.R. 283; 19 *Juridical Review*, 178.

⁴ Halsbury's *Laws of England*, vii. 101. This is the rule in New Jersey; see *Bolmer v. Edsall*, 90 N.J. Eq. 299, cited Dicey (5th ed.), p. 742. Compare the rule relating to torts committed on board a ship, *supra*, p. 284.

discover from the authorities what part of English law governs a marriage upon a ship that is registered in England. Is it the common law or the common law as regulated by statute? The latter alternative appears clearly to be excluded. There is no statute that deals particularly with marriages at sea, except one which provides that every such marriage shall be entered in the ship's log,¹ and the 'floating island' theory can scarcely be pressed so far as to suggest that the Marriage Acts are applicable. Except where modified by statute, the common law is in force on a ship, as in the analogous case of a colony. To make the analogy complete it must also be conceded that only so much of the law is imported into the ship as is suitable to the local conditions. That raises the further question whether it suffices that the parties have freely taken each other for man and wife, or whether, in accordance with *R. v. Millis*,² it is necessary that the ceremony should have been performed by an ordained clergyman. That the presence of a clergyman is sufficient for validity seems generally to be admitted,³ but that it is essential appears unwarranted. The impossibility of procuring a clergyman on the high seas is even more apparent than in the case of a remote part of China, and it is difficult to resist the conclusion that the rule laid down in *Wolfenden v. Wolfenden*⁴ applies equally to a ship. The argument sometimes advanced, that a ship must sooner or later put into a port where advantage may be taken of the facilities offered by the local law or by the Foreign Marriage Act, is of little weight. It can be countered by the reflection that the same facilities are open to parties in a remote part of China if they are prepared to make the necessary journey.

It is sometimes suggested that the absence of a clergyman is fatal to the validity of a marriage at sea, unless it is a *marriage of necessity*.⁵ What this ambiguous expression means is not explained, but there is little doubt that it is taken from the Irish case of *De Moulin v. Druitt*⁶ in 1860, which is no longer a safe guide. In that case:

A woman stowaway was discovered on a troopship during a voyage to India. In the lofty fashion of those days the commanding officer ordered that she should immediately be married to one of the troops. A

¹ Merchant Shipping Act, 1894, s. 240 (6); 253 (1) (viii).

² *Supra*, p. 329.

³ 5 *L.Q.R.* 53.

⁴ *Supra*, p. 332.

⁵ Latcy on Divorce, p. 30; Halsbury's *Laws of England* (2nd ed.), xvi. 597.

⁶ (1860), 13 *Ir. C.L. Reps.* 212.

candidate was found, and the marriage was celebrated on the quarter-deck in the presence of the commanding officer.

The court held that the rule in *R. v. Millis*¹ applied and that the marriage was void. *Maclean v. Cristall*,² a case where a marriage celebrated in India by a Congregationalist minister not in holy orders was held to be valid, was distinguished on the ground that the marriage was not one 'of necessity', since the vessel would touch at places where a clergyman would be obtainable. Having regard to *Wolfenden v. Wolfenden*,³ it would seem that this peculiar reasoning need no longer be considered seriously.

It is submitted, then, that if parties, whatever their domicile or nationality, voluntarily take each other as man and wife while at sea in a vessel registered at an English port, the marriage is formally valid in the eye of English law.

It has never been doubted, of course, that a marriage in a foreign country, where local formalities are non-existent or where those that exist are inapplicable to an English marriage, is valid if it is contracted in the presence of an episcopally ordained priest or deacon.⁴

IV. MATRIMONIAL CAUSES

Introduction. *Pages* 334-7.

A. Suits for Nullity of Marriage. *Pages* 337-65.

B. Suits for Dissolution of Marriage. *Pages* 365-87.

C. Suits for Judicial Separation. *Pages* 387-9.

D. Suits for Restitution of Conjugal Rights. *Pages* 389-90.

Introduction

Before the
Reforma-
tion matri-
monial
causes
raised no
conflict

A matrimonial cause is now statutorily defined as an action for nullity of marriage, divorce, judicial separation, jactitation of marriage or restitution of conjugal rights.⁵ In early days these actions, or suits as they are generally called, raised no question of private international law, since, with the exception of divorce *a vinculo*, i.e. dissolution of marriage which was not then recognized, they were all exclusively subject to the jurisdiction of ecclesiastical courts whose sway extended throughout western Europe.

¹ (1843-4), 10 Cl. & F. 534; *supra*, p. 329.

² (1849) Perry's *Oriental Cases*, 75.

³ [1946] P. 61; *supra*, p. 332.

⁴ *Limerick v. Limerick* (1863), 32 L.J. (P.M. & A.) 92; *Phillips v. Phillips* (1921), 38 T.L.R. 150.

⁵ Supreme Court of Judicature Act, 1925, s. 225.

'The jurisdiction of the Court Christian', said James L.J., 'was a jurisdiction over Christians, who, in theory, by virtue of their baptism, became members of the one Catholic and Apostolic Church. The Church and its jurisdiction had nothing to do with the original nationality or acquired domicils of the parties, using the word domicil in the sense of the secular domicil, viz. the domicil affecting the secular rights, obligations and status of the parties.'¹

The jurisdiction depended upon residence. Every person resident within a diocese was subject to the jurisdiction of the Bishop. Moreover, not only did the courts administer a law that was common throughout Christendom, but their judgments were recognized both by secular and ecclesiastical authorities. This state of affairs came to an end with the Reformation, which disrupted the unity that had previously characterized ecclesiastical law and the courts by which it was administered. Every person resident in an English diocese was still subject to the ecclesiastical jurisdiction of the Bishop, but the law administered by him was essentially English law and his decrees were not entitled as of right to recognition in other Christian countries. By legislation passed in the reign of Henry VIII, the right of appeal which had formerly lain to the Pope now lay to the Crown.²

The most important matter upon which English law ultimately came to differ from that of the Continent was divorce. The canon law, purporting to be the law of God and to have derived its principles from the Scriptures, imposed the doctrine of the indissolubility of marriage upon the western Church. There was in theory no escape save by death. Divorce *a vinculo* was prohibited. Two remedies were, however, available—divorce *a mensa et thoro*, nowadays called judicial separation, and annulment. The former left the parties indissolubly married but separated them from bed and board. It was granted for adultery, unnatural offences, cruelty, heresy and apostasy. The second remedy of annulment was manipulated with such ingenuity that in practice it frequently served the same purpose as divorce *a vinculo*. According to canon law both consent and sexual intercourse (*coitus*) were the essential requirements of a valid marriage. Consent without *coitus* or *coitus* without consent was insufficient.³ There were, therefore, two kinds of

The canonist doctrine of indissolubility

¹ *Niboyet v. Niboyet* (1878), 4 P.D. 1, 4.

² Westlake, p. 83.

³ 'Coitus sine voluntate contrahendi matrimonium et defloratio virginittis sine pactione conjugali non facit matrimonium', Gratian, *Decretum*, C. 34.

impediments to marriage, either of which was cause for annulment. First, any defect which vitiated the initial contract, such as want of free consent due to duress, mistake, fear and the like, or an earlier espousal to another person, or consanguinity. Such a defect was an *impedimentum dirimens*, a destructive impediment that notwithstanding *coitus* rendered the marriage void *ab initio*. Secondly, failure to follow consent by *coitus* constituted an *impedimentum impeditivum*, an obstructive impediment that was ground for annulment. The canonists showed such acumen in adapting these impediments to the needs of particular cases that in practice it was not uncommon for parties to regain by annulment their status of celibacy without disturbing the doctrine of indissolubility. This doctrine was never abandoned but its inconveniences were mitigated.¹

English
practice
after the
Reforma-
tion

The Reformation did not enlarge the power of the ecclesiastical courts in England to grant matrimonial relief. Annulment of marriage on the grounds recognized by canon law was possible, dissolution was still impossible. But growing dissatisfaction with the doctrine of indissolubility led to the practice of obtaining a divorce by a private Act of Parliament, the first case being that of the Marquis of Northampton in 1551.² This was an expensive and a complicated proceeding. The husband first obtained from the ecclesiastical court a decree of divorce *a mensa et thoro*, which, though it separated him from his wife, did not entitle him to remarry. He then sued at common law to recover damages from the man who had committed adultery with his wife. Finally he promoted in the House of Lords a private Bill for Divorce, which was in effect a bill to procure the right of remarriage.³ This proceeding was legislative only in form. The House had its own law and practice in the matter, and it functioned as a Court of Justice with the apparatus of counsel and witnesses. This method of obtaining a divorce still prevails in Quebec, and in Northern Ireland it was not supplanted by judicial process until 1939. On the other hand, a divorce by judicial process has been possible in Scotland since the sixteenth century.

¹ In the Marlborough Case in 1926 the Roman Rota affirmed a declaration of the Southwark Diocesan Court that a marriage celebrated in 1895 was void on the ground that the wife had not given her free consent to the union. There were two children of the union, the parties had been divorced in 1920, and each had remarried.

² The so-called divorces of Henry VIII were in fact annulments.

³ There seem to have been only four occasions upon which a wife promoted a private bill.

A fundamental change was effected in England by the Matrimonial Causes Act, 1857, which transferred jurisdiction in matrimonial causes from the Church to the State. It set up a 'Court for Divorce and Matrimonial Causes', and conferred upon this civil tribunal jurisdiction to entertain suits for judicial separation, nullity of marriage, restitution of conjugal rights and jactitation of marriage, though as regards these matters there was express statutory provision that relief should be given on principles and rules that should be as nearly as possible conformable to the principles and rules on which the ecclesiastical courts had previously acted.¹ In addition, the Act made a complete break with the past by empowering the court to pronounce a decree for dissolution of marriage.

It is now necessary to examine the various matrimonial causes separately and to ascertain, in each case, first, what suffices from the point of view of English private international law to give a court, whether English or foreign, jurisdiction to entertain the suit, and secondly, what system of law will govern the suit when such jurisdiction exists.

A. SUITS FOR NULLITY OF MARRIAGE

1. Introduction. *Pages 338-41.*

2. English suits. *Pages 341-58.*

(1) Jurisdiction of English courts. *Pages 341-52.*

(i) Annulment of voidable marriages. *Pages 343-8.*

(a) Petition based on English domicile. *Pages 343-4.*

(b) Petition based on English residence. *Pages 344-8.*

(c) Petition based on English place of ceremony. *Page 348.*

(ii) Annulment of void marriages. *Pages 348-52.*

(a) Petition based on English domicile. *Pages 348-50.*

(α) Common domicile in England. *Page 348.*

(β) Petitioner alone domiciled in England. *Page 349.*

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(b) Petition based on English residence. *Pages 350-2.*

(c) Petition based on English place of ceremony. *Page 352.*

(2) Choice of Law. *Pages 353-8.*

3. Foreign Suits. *Pages 358-65.*

(1) Jurisdiction of foreign courts. *Pages 358-63.*

(i) Annulment of voidable marriages. *Pages 359-60.*

(a) Jurisdiction based on domicile. *Page 359.*

(b) Jurisdiction based on residence. *Page 359.*

(c) Jurisdiction based on place of marriage. *Page 360.*

¹ S. 22; repealed by the Judicature Act, 1925, and replaced by s. 32 of that Act.

(ii) Annulment of void marriages. *Pages* 360-3.

(a) Jurisdiction based on domicil. *Pages* 360-2.

(b) Jurisdiction based on residence. *Page* 362.

(c) Jurisdiction based on place of marriage. *Page* 363.

(2) Choice of law. *Pages* 363-5.

1. Introduction

Unsatisfactory
state of the
law

In the field of private international law the English decisions with respect to nullity of marriage, as regards both jurisdiction and choice of law, are still in an unsatisfactory state. They suffer from several defects. They fail to appreciate that the rules which governed the old ecclesiastical courts are scarcely congenial to the changed conditions of the modern world; they more often than not disregard the distinction between jurisdiction and choice of law; they frequently fail to disclose which of two or more possible grounds is the *ratio decidendi*; and so far they have not elaborated a coherent system of law based upon broad general principles. Meanwhile, piecemeal legislation has increased the inelegance of this department of law.

Distinction
between
void and
voidable
marriages
Void marriages
in English
law

One cause of the present discontents is the distinction that English international law, in common with most foreign legal systems, makes between void and voidable marriages. A marriage is void *ab initio* in the following cases:

- (i) If either party is under sixteen years of age.¹
- (ii) If the appropriate formalities have not been observed.²
- (iii) If the parties are within the prohibited degree of relationship as laid down in the first schedule to the Marriage Act, 1949.³
- (iv) If either party is already married.
- (v) If either party is a certified lunatic.⁴
- (vi) If either party is coerced into marrying, or is fraudulently misled as to the identity of the other party or as to the nature of the ceremony.⁵

Voidable
marriages
in English
law

A marriage is voidable in the following cases:

- (i) If, owing to impotence, either party is incapable of consummating the marriage.
- (ii) If either party wilfully refuses to consummate the marriage.⁶

¹ Marriage Act, 1949, s. 49.

² *Ibid.*, s. 2.

³ S. 1.

⁴ Marriage of Lunatics Act, 1811.

⁵ See, for example, *Mehta v. Mehta*, [1945] 2 All E.R. 690; *infra*, p. 355.

⁶ Matrimonial Causes Act, 1950, s. 8 (1) (a).

- (iii) If, at the time of the marriage, either party was of unsound mind or a mental defective or subject to recurrent fits of insanity or epilepsy.¹
- (iv) If the respondent was suffering at the time of the marriage from venereal disease in a communicable form.²
- (v) If the respondent at the time of the marriage was pregnant by some man other than the petitioner.³

The view taken by English law is that a void marriage is a complete nullity from the beginning. It is as if the parties were living together in sin without having gone through a ceremony of marriage. No proceedings are necessary to establish the fact of nullity. Effect of void marriage

‘A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is the issue as never having taken place, and can be so treated by both parties to it without the necessity of any decree annulling it.’⁴

Moreover, any member of the public may treat the marriage as void, notwithstanding the absence of a decree, as, for instance, by withholding payment of money that is due to the woman conditionally on her being the wife of the man.

On the other hand, the effect of a defect, such as impotence, which renders a marriage voidable, is far different, for the status of the parties as husband and wife, having sprung from a contract free from imperfection, cannot be affected until the existence of the defect has been proved, and therefore the rule is that the marriage is valid and must be treated as such by every court and every person until it has been judicially declared void. No one but the parties themselves can be heard to deny that they are married or can challenge, by nullity proceedings or otherwise, the validity of their marriage. Until either of them obtains a decree of nullity, all the normal consequences of the married status ensue, both *inter se* and as regards third parties.⁵ Effect of voidable marriage

¹ Ibid., s. 8 (1) (b).

² Ibid., s. 8 (1) (c).

³ Ibid., s. 8 (1) (d). In cases (iii), (iv), and (v) no decree must be granted unless the court is satisfied that the petitioner at the time of the marriage was ignorant of the facts, that proceedings have been instituted within one year of the marriage, and that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

⁴ *De Reneville v. De Reneville*, [1948] P. 100, 111; *per* Lord Greene.

⁵ *In re Eaves*, [1939] Ch. 1000, 1003; *Fowke v. Fowke*, [1938] Ch. 774, 779; *De Reneville v. De Reneville*, [1948] P. 100, 111; *R. v. Algar*, [1954] 1 Q.B. 279.

Voidable
marriage:
retrospec-
tive effect
of annul-
ment

Nevertheless the annulment of a voidable marriage has a retrospective effect. The parties possess the status of husband and wife until annulment, but from that moment they are regarded as never having been married.¹ The form of the nullity decree makes this clear:

'Let the marriage in fact had and solemnized be pronounced and declared to *have been* and to be absolutely null and void to all intents and purposes in the law whatsoever . . . and the petitioner be pronounced to *have been* and to be free from all bond of marriage with the respondent.'

This doctrine of relation back may lead to bizarre situations,² but its worst possibilities are avoided by the rule that transactions completed before annulment cannot be set aside.³ Until recently it might operate to bastardize children who had perhaps for many years been the legitimate offspring of a valid marriage,⁴ but it is now enacted that:

When a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved, instead of being annulled, on the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment.⁵

Historical
basis of
retrospec-
tive doc-
trine

The doctrine of relation back is no doubt explicable on historical grounds. According to canon law a marriage is indissoluble. It cannot be temporarily valid. It must either exist for ever or it must never have existed. The only form of nullity decree, therefore, open to the ecclesiastical courts was one which declared that the parties had never been married. The form is still retained, but in these latter days the doctrine and the reasons upon which it was founded are scarcely compatible with contemporary views respecting the sanctity of the marriage tie. As Lord Goddard said, the form 'perpetuates a canonical fiction'.⁶

Void mar-
riage as
such does
not change
the
woman's
domicil

One result of the distinction between void and voidable marriages, of vital significance in the present context, is its bearing upon the domicile of the woman. The rule that a wife takes the domicile of her husband by operation of law presupposes a marriage. It therefore does not apply to a void

¹ *Newbould v. A.G.*, [1931] P. 75. See F. H. Newark, 8 *M.L.R.* 203.

² *Mason v. Mason*, [1944] N.Ir. 134; see 61 *L.Q.R.* 341 et seqq.

³ *Dodworth v. Dale*, [1936] 2 K.B. 503; *Fowke v. Fowke*, [1938] Ch. 774; *In re Eaves*, [1939] Ch. 1000. But see *In re Ames' settlement*, [1946] Ch. 217.

⁴ *Dredge v. Dredge*, [1947] 1 All E.R. 29.

⁵ Matrimonial Causes Act, 1950, s. 9.

⁶ *R. v. Algar*, [1954] 1 Q.B. 279, 288.

marriage, for if the parties have never been married there is no 'wife' and no 'husband'. Of course, if the woman in fact establishes her permanent home in the man's country, as will more often than not be the case, she will acquire a domicile of choice there. In other words she is free to acquire it, but it does not attach to her automatically.¹

On the other hand, a voidable marriage confers the status of married persons upon the parties, and one of the consequences of this is that the woman, in her capacity as wife, necessarily and automatically acquires her husband's domicile. This remains true even if she presents a petition for nullity which, if successful, will lead to a declaration that she has never been married. The retrospective terms of the decree that may possibly be granted cannot disturb her former status of a wife.² 'To hold otherwise would be to allow oneself to be misled by the mere wording of a form of decree which was adopted in the past for reasons which are no longer appropriate.'³

In voidable marriage wife automatically takes husband's domicile

With these preliminary remarks, an attempt will now be made to state the existing law, dealing first with suits brought in England and then with the recognition of suits that have already been concluded abroad.

2. *English Suits*

(1) *Jurisdiction of English courts.*

In every English suit for nullity involving a foreign element a preliminary essential is to identify the proper law that determines whether the alleged defect, presuming its existence to be proved, will render the marriage void or voidable. There are at least three reasons for this.

Proper law to determine nature of a marriage depends upon nature of alleged defect

First, whether the court has jurisdiction varies according as the marriage is void or voidable.

Secondly, a wife married to a man domiciled abroad cannot invoke the jurisdiction of the court on the ground of a separate English domicile if the marriage is voidable, but she is free to do so if it is void.⁴

Thirdly, the substantive law concerning annulment is not uniform throughout the world. For example, insanity is no ground for a decree of nullity in France, and 'in some countries

¹ *De Reneville v. De Reneville*, [1948] P. 100, 110.

² *Ibid.*, at p. 111, *per* Lord Greene.

³ *Ibid.*

⁴ *Infra*, pp. 347, 349.

impotence and wilful refusal render the marriage void, in others they make it voidable, and in others again they constitute grounds for divorce'.¹

The identity of the proper law depends upon the juridical nature of the defect that is alleged to vitiate the marriage. As will be seen later, such defects are either contractual or personal. The former are those which vitiate either the contract to marry or the ceremony by which that contract is implemented, and which do not represent an incapacity personal to those very parties or to one of them. They are referred to the *lex loci celebrationis*. An obvious example is a failure to observe the correct formalities at the marriage ceremony. In contrast, the alleged infringement of a rule disabling the one party from marrying the other, as for instance a rule prohibiting the inter-marriage of an uncle and his niece, asserts the existence of a *personal defect* that must be referred to the law of the matrimonial domicile.²

Function
of the
proper law

The role of the proper law, whether it is the *lex loci celebrationis* or the law of the matrimonial domicile, is to determine whether the alleged defect is sufficient ground for annulment and if so what consequences ensue, presuming its existence to be proved. One of these consequences is the extent of the invalidity of the union, i.e. whether the marriage is merely voidable or void *ab initio*.

Operation
of the
proper law
illustrated

In *De Reneville v. De Reneville*,³ for instance,

a wife, resident in England, petitioned the court for the annulment of her marriage to a man domiciled and resident in France on the ground of his incapacity or wilful refusal to consummate the marriage.

The jurisdictional principles applicable to these facts were that if the marriage was void for either of these defects, the petitioner would be entitled to relief by virtue of her separate English domicile; but that if it was voidable, she would be domiciled in France and her mere residence in England would not render the court competent to entertain the suit. The Court of Appeal held that it fell to French law, as being the law of the matrimonial domicile, to determine the effect of impotence or wilful refusal, both of which are examples of personal defects. Since the French rule on the matter, however, had not been given in evidence, it was assumed to be the same as that

¹ Wolff, op. cit., p. 82, note 6.

² *Infra*, pp. 353 et seqq.

³ [1948] P. 100.

obtaining in England with the result that the marriage was treated as voidable and the petition was dismissed.¹

(i) *Annulment of voidable marriages.*

(a) *Petition based on domicil.* In the case of a voidable marriage the domicil of the husband is necessarily communicated to the wife, and if this common domicil is English it is undoubted that the court possesses nullity jurisdiction. As Lord Phillimore said in a leading case:

Juris-
diction
exists if
husband
domiciled
in England

‘For the purpose of pronouncing upon the status of the parties as well as for the purpose of affecting that status, the court of the law which regulates or determines the personal status of the parties, if they are both subject to the same law, decides conclusively.’²

The authorities which establish this proposition all relate to the jurisdiction of the foreign court of the common domicil, but obviously they are equally applicable to a case where the parties are domiciled in England.³

There is one exceptional case, based upon the prior English domicil of the wife alone, in which jurisdiction is statutorily conferred upon the court, notwithstanding that at the time of the proceedings the common domicil of the parties is foreign.

Juris-
diction
when
husband,
not domi-
ciled in
England,
deserts wife

The statute in question provides that the court shall have jurisdiction to entertain proceedings by a wife

if she has been deserted by her husband or if the husband has been deported as an alien from the United Kingdom, provided that he was domiciled in England *immediately before the desertion or deportation*.⁴

The words italicized stress the restrictive nature of this enactment. Its operation is conditioned by the prior English domicil of the husband and therefore of the wife, and the critical date for this purpose is the time of the desertion or deportation. Despite desertion or deportation, it does not avail a

¹ It would appear that in fact impotence is not a ground for annulment by French law, though if concealed before marriage it may justify divorce as being an *injure grave*; Amos and Walton, *Introduction to French Law*, p. 61.

² *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641, 670.

³ *Ibid.*; *Inverclyde v. Inverclyde*, [1931] P. 29; *De Reneville v. De Reneville*, [1948] P. 100.

⁴ Matrimonial Causes Act, 1950, s. 18 (1) (a) re-enacting the Matrimonial Causes Act, 1937, s. 13. ‘Proceedings’ includes divorce, judicial separation and restitution of conjugal rights as well as annulment. The Matrimonial Causes (War Marriages) Act, 1944, was another example of jurisdiction based upon the prior domicil of the wife, but proceedings under this Act ceased to be possible after 1 June 1950; *S.I.*, No. 672 of 1950.

woman merely because she was domiciled in England immediately before her *marriage* to a man domiciled abroad. Her only remedy in such a case, in addition to instituting proceedings in the husband's domicil, is to take advantage of another enactment which bases jurisdiction upon her residence in England.¹

Is Annulment of voidable marriage to be equated with divorce? (b) *Petition based on English residence.* The fundamental question, which for several years was a matter of controversy, is whether mere residence in England, even of both parties, is sufficient to found the jurisdiction of the court in the case of a voidable, as distinct from a void, marriage. In *Inverclyde v. Inverclyde*,² Bateson J. took the view that since the decree of nullity, despite its retrospective effect, terminates the status which the parties have hitherto possessed, it should for purposes of jurisdiction be equated with a decree of divorce, with the result that the only competent court will be the court of the common domicil. The facts of the case were as follows:

The wife petitioned the English court for annulment on the ground of the impotence of her husband. The marriage had been celebrated in London, the domicil of the parties was Scottish, the petitioner resided in England, the respondent had residences both in England and Scotland.

Bateson J. dismissed the petition on the ground that since the parties were not domiciled in England he lacked jurisdiction. His reasoning in brief was this:

The principle that the court of the domicil has exclusive jurisdiction in divorce was not established until 1895,³ long after the abolition of the ecclesiastical courts; the basis of this principle is that a divorce suit affects status; a nullity suit in respect of a voidable marriage equally affects status; therefore the annulment of a voidable marriage should be equated with divorce and should depend exclusively upon the domicil of the parties, at any rate if the cause for annulment is impotence.⁴

'Nullity on the ground of impotence', he said, 'is a suit to avoid a marriage and is in essence a suit to dissolve it. . . . The marriage remains a marriage until one of the parties seeks to get rid of the tie. In other cases, such as bigamy, there has never been a marriage at all.'⁵

The equation supported by nature of nullity decree Regarded as a matter of principle, there is much force in the reasoning of the learned judge, if only on the ground that a decree of nullity in respect of a voidable marriage is a judgment *in rem*, i.e. one which finally adjudicates upon the status of a *res*.

¹ Matrimonial Causes Act, 1950, s. 18 (1) (b); *infra*, p. 347.

² [1931] P. 29.

³ *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; *infra*, p. 366.

⁴ The argument was summarized thus by the A.-G. for Northern Ireland in *Mason v. Mason*, [1944] N.Ir. 134.

⁵ [1931] P., at p. 40.

Marriage, though not literally a *res*, 'savours of a *res* and has all along been treated as such'.¹ It is a disembodied thing. The principle of English law is that an effective adjudication *in rem* can be given only by the court of the country wherein the *res* is situated. So the problem is—Where is this disembodied thing, the marriage, situated? If we are to be consistent, it can scarcely be situated in more than one place at one and the same time, which is tantamount to saying that the courts of the domicil and of the residence and of the place of marriage, if these places are different, cannot all be entitled to annul a voidable marriage. For the purposes of divorce, there is no doubt that the marriage is regarded by the common law as situated in the country of the domicil and nowhere else. Why, then, should not the same conclusion be reached in the case of the voidable marriage? Historically and technically, no doubt, divorce and annulment are not identical, but there is no theoretical or solid objection to ruling on rational grounds that the annulment of a voidable marriage must be regarded as a proceeding *in rem* triable only in the court of the domicil, since it declares to be non-existent a status which hitherto the parties have possessed in the eyes of the law and which, but for the annulment, they would lawfully have possessed until one of them died.

If, however, the matter is viewed in the light of convenience and natural justice, it is apparent that to confine jurisdiction to the court of the domicil, sound though it may be in principle, encounters a practical and serious objection. It places a needless restriction upon the right of a party to claim matrimonial relief. If followed literally, it means *inter alia* that the parties cannot obtain relief in a country where they have both been resident, though not technically domiciled, for a long time. This is an unnecessary hardship. The wise policy, it is submitted, is to multiply within reason the bases of jurisdiction, but to insist upon the application of the proper law. Strict principle may perhaps demand that the annulment of a voidable marriage, since it affects status, should be submitted to the court and to the law of the domicil. But convenience and justice demand with equal potency that proceedings for the enforcement of the *law* of the domicil should be available to the parties in the country where they are resident though not perhaps domiciled. It matters little where the machinery is put in

Practical
reasons
against the
equation

¹ *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641, 662, per Lord Dunedin.

motion, provided that the correct law is applied. The proviso, however, is of vital importance. What must be resisted at all costs is the present tendency to apply the *lex fori* as a matter of course. For an English court to annul a voidable marriage on a ground not recognized as sufficient by the foreign law of the domicile is not only the negation of principle but socially scandalous. The mere widening of jurisdiction, however, need lead to no scandal.

The
equation
rejected

There is no need, however, to pursue the matter further. The view of Bateson J. was rejected by two courts of first instance¹ and finally his decision was overruled by the Court of Appeal in *Ramsay-Fairfax v. Ramsay-Fairfax*,² where it was held that the jurisdiction of the court is well founded if *both* parties are resident in England, though domiciled in Scotland, at the time when the petition is presented.

Reasons
for its
rejection

It is perhaps a little unfortunate that the Lords Justices adopted the argument of counsel and justified the assumption of jurisdiction upon the practice of the old ecclesiastical courts rather than upon the score of convenience. It is true, of course, that the jurisdiction of those courts was conditioned by the residence of the parties in the diocese. It is also true that the present civil court was directed by the Act of 1857 to act and to give relief upon principles and rules as nearly as possible conformable to those that had obtained in the church courts.³ This contention, however, disregards the fact that, owing to the uniformity of matrimonial law and practice throughout Christendom, the early church courts were not troubled with questions of the conflict of laws, and it does not follow that a practice which was appropriate enough in those conditions should be continued in a different environment. As Wolff remarked, the ecclesiastical rule as to residence dealt with questions 'not of international jurisdiction but of local competence'.⁴ It was a rule that prescribed the jurisdictional area of the courts whose function it was to administer the uniform ecclesiastical law to members 'of the one catholic and apostolic

¹ *Easterbrook v. Easterbrook*, [1944] P. 10; *Hutter v. Hutter*, [1944] P. 95.

² [1956] P. 115.

³ Matrimonial Causes Act, 1857, s. 22. This has been replaced by the more tepid enactment: 'The jurisdiction vested in the High Court and Court of Appeal respectively shall, so far as regards procedure and practice . . . be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained', Supreme Court of Judicature Act, 1925, s. 32.

⁴ *Private International Law*, p. 84.

church'. As such, it is scarcely a sure guide in days when the unity is a memory of the past, and if residence is to form a basis of jurisdiction it is in reason rather than in the ancient organization of domestic courts that it must find its vindication.

It is now settled by the decision of the Court of Appeal in *De Reneville v. De Reneville*¹ that at common law the residence in England of the *petitioner alone* does not give the court jurisdiction in respect of a voidable marriage. In the words of Lord Greene: 'That a wife who is resident but, *ex hypothesi*, not domiciled here can compel her husband who is both domiciled and resident abroad to come to this country and submit the question of his status to the courts of this country appears to me to be contrary both to principle and to convenience.'²

Residence of petitioner alone not a basis of jurisdiction

There is, however, one statutory exception to the rule that the English residence of the petitioner alone is insufficient to found jurisdiction. The Matrimonial Causes Act, 1950, re-enacting an earlier statute,³ provides that the court shall have jurisdiction at the instance of a wife

Statutory jurisdiction based on residence of wife

in the case of proceedings for divorce or nullity, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.⁴

The chief feature of this enactment is that it avails only the wife. It has, indeed been suggested that if she takes advantage of it her husband can only defend himself and cannot counter-attack, that is to say, he cannot himself claim relief, whether annulment or divorce, for a cause not pleaded by his wife.⁵

It will be noticed that the wife must be resident in fact in England at the time of the presentation of the petition and must also have been 'ordinarily resident' there during the last three years. The precise meaning of the expression 'ordinarily resident' has caused a little difficulty and one judge has gone so far as to say that the adverb adds nothing to the adjective.⁶

Meaning of 'ordinarily resident'

¹ [1948] P. 100; *supra*, p. 342, overruling *Robert v. Robert*, [1947] 2 All E.R. 22, and *Roberts v. Brennan*, [1902] P. 143, if the latter in fact decided that residence of the petitioner alone is a sufficient basis of jurisdiction. It was, however, concerned with a void marriage; see *infra*, p. 351.

² [1948] P., at p. 118.

³ Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (1) (2).

⁴ Matrimonial Causes Act, 1950, s. 18 (1) (b).

⁵ *Sealey v. Callan*, [1953] P. 135, 140.

⁶ *Hopkins v. Hopkins*, [1951] P. 116.

It seems clear, however, that the word 'ordinarily' is used deliberately in order to distinguish the wife's physical presence in England at the time of the proceedings from her habitual residence during the preceding three years. Habitual or ordinary residence does not connote continuous physical presence, but physical presence with some degree of continuity, notwithstanding temporary absences.¹

Each case, of course, must depend upon its own peculiar facts, but the authorities show that even absence for a considerable time will not terminate a person's habitual residence if it is due to some specific and unusual cause, as for instance when a wife accompanies her husband during his employment in a foreign country.² Again, the significance of a comparatively prolonged absence will be weakened if, during the relevant period, the wife has maintained a house or flat in England ready for immediate occupation, for one of the tests of her ordinary or habitual residence is the location of her real home.³

English
place of
marriage
not *per se* a
basis of
jurisdiction

(c) *Petition based on English place of ceremony.* The bare fact that the parties married in England has long been recognized as sufficient to confer nullity jurisdiction on the English court in respect of a void marriage,⁴ but until 1949 it was doubtful whether this held good in the case of a voidable marriage. In that year, in a case where the petitioner alleged the wilful refusal of the husband, domiciled and resident in Canada, to consummate the marriage, the Court of Appeal resolved the doubt by holding that the English place of celebration does not *per se* render the court competent to annul this type of marriage.⁵

(ii) *Annulment of void marriages.*

(a) Common
domicil in
England

(a) *Petition based on domicil.* There is ample authority for the somewhat obvious rule that the court of the country in which both parties are domiciled has nullity jurisdiction in respect of a void marriage.⁶ In this type of marriage, however, the woman

¹ *Levene v. Inland Revenue Comrs.* [1928] A.C. 225, 232.

² *Stransky v. Stransky*, [1954] P. 428; *Lewis v. Lewis*, [1956] 1 W.L.R. 200.

³ *Ibid.*

⁴ *Infra*, p. 352.

⁵ *Casey v. Casey*, [1949] P. 420. This decision has not been followed in Northern Ireland; *Addison v. Addison*, [1955] N.I. 1. This Irish decision perhaps misled Denning L.J. in *Ramsay-Fairfax v. Ramsay-Fairfax*, [1956] P. 115; see his remark at p. 134.

⁶ *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641; *De Massa v. De Massa*, [1939] 2 All E.R. 150 N; *Galene v. Galene*, [1939] P. 237.

does not acquire her husband's domicile by operation of law.¹ If, therefore, she was domiciled abroad before going through a ceremony of marriage with a man domiciled in England and the jurisdiction of the court is invoked by reason of a common domicile, it must be proved that she has in fact acquired an English domicile of choice.

It is also established that the English domicile of the petitioner alone, whether the man or the woman, suffices to found jurisdiction. If this were not so and if a common domicile were required in all cases, the question of jurisdiction might be insoluble, for since no marriage exists there cannot be a common domicile unless the woman acquires a domicile of choice in England.²

(β) Petitioner alone domiciled in England

In *White v. White*³ the domicile of the woman alone was held to be a valid basis of jurisdiction. The facts were these:

Petition by the woman

A domiciled Englishwoman, while on a trip to Australia, went through a ceremony of marriage at Melbourne with the respondent, whose wife was still living. The woman returned to England two days later without any consummation of the marriage. She later took nullity proceedings in England. The respondent did not enter appearance, but he acknowledged service of notice to appear and signed a formal admission that at the time of the Melbourne ceremony he was married to a wife resident in Malta.

Bucknill J. granted a decree notwithstanding that the respondent was neither resident nor domiciled in England. For a time it was controversial whether the learned judge had assumed jurisdiction on the ground of the domicile or of the residence of the petitioner in England. The Court of Appeal has now, however, approved the decision and has placed it squarely on the ground of domicile.⁴ There are other cases in which jurisdiction has presumably been based upon the pre-ceremony domicile of the woman.⁵

Jurisdiction will likewise exist by virtue of domicile if it is the man who is alone domiciled in England.⁶ This will occur, for instance, where he goes through a ceremony with a woman

Petition by the man

¹ *Supra*, p. 340.

² *De Reneville v. De Reneville*, [1948] P. 100, 113, *per* Lord Greene.

³ [1937] P. 111.

⁴ *De Reneville v. De Reneville*, [1948] P. 100, 112-113.

⁵ e.g. *Hussein v. Hussein*, [1938] P. 159.

⁶ *Wolfenden v. Wolfenden*, [1946] P. 61 (where the petitioner seems to have acquired an English domicile); *Way v. Way*, [1950] P. 71; reversed *sub nom. Kenward v. Kenward*, [1951] P. 124.

domiciled abroad who does not acquire her own domicil of choice in England.

(γ) Exceptional statutory case

An exceptional case, in which a woman is entitled to invoke the jurisdiction of the court by reason of her prior English domicil, arises under the Matrimonial Causes Act, 1950,¹ which has already been discussed.²

Jurisdiction based on ordinary residence of wife

(b) *Petition based on English residence.* As we have already seen, the English court is statutorily competent to annul a void marriage if the woman is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of proceedings by her, provided, however, that the man is not domiciled in another part of the United Kingdom or in the Channel Islands or the Isle of Man.³

Two doubts remain.

First, is nullity jurisdiction in respect of a void marriage well founded at common law on the residence of both parties in England?

Is common residence or residence of petitioner sufficient?

Secondly, does the common law rule, that the English residence of the petitioner alone is an insufficient basis of jurisdiction in the case of a voidable marriage,⁴ apply to a void marriage?

It is submitted that either common residence or the residence of the petitioner alone should suffice in the case of a void marriage. Two practical considerations in favour of the submission are that the legislation recognizes the sufficiency of a limited period of residence by the wife, when proceedings are instituted by her, and also that, at any rate according to one authority, a foreign annulment, even of a voidable marriage, based upon the residence of both parties in the forum, must be recognized as effective by English law.⁵

Submitted that residence of petitioner alone suffices

The real mystery, indeed, is why any doubt should exist. There is something to be said for the doctrinaire who insists that questions of status should be justiciable only in the court of the domicil and that therefore jurisdiction over a voidable marriage cannot be based upon residence, but the parties to a void marriage have never possessed the married status. Even a nullity decree does not change their status. It does not in truth nullify a marriage, but formally declares that a marriage never came into existence. Any member of the public can regulate his conduct on that undoubted fact, decree or no

¹ S. 18 (1) (a).

² *Supra*, p. 343.

³ Matrimonial Causes Act, 1950, s. 18 (1) (b); *supra*, p. 347.

⁴ *Supra*, p. 347.

⁵ *Mitford v. Mitford*, [1923] P. 130; *infra*, p. 364.

decree. Any court in England can pronounce upon the nullity of the ceremony regardless of the residence or domicil of the parties if the question arises *incidenter* in some other proceeding.¹ Is something more, then, than the English residence of the petitioner to be required if he desires a direct and authoritative ruling upon his status?

If a man domiciled in New Zealand, but resident for the last ten years in England, has gone through a ceremony of marriage in Paris with a Frenchwoman who is already married to a living husband, is he to be precluded from obtaining a nullity decree from the English court?

It is true that no decree is necessary, but it is at least socially desirable that the invalidity of his marriage, the ventilation of which in private conversation may cause him harm and suffering, should be judicially affirmed beyond all doubt. If the woman were to be indicted for bigamy, the court would be bound to pronounce upon the invalidity of the marriage, and it is a little inconsistent to deny it this power when the invalidity is the sole issue. The denial is even more harmful in cases other than bigamy, when the existence of the marriage admits of greater doubt. If, for instance, before the statutory extension of jurisdiction noticed above, the woman petitioner in *Mehta v. Mehta*,² whose marriage at Bombay was the result of deception, had been domiciled in New Zealand but long resident in England, it is scarcely conceivable that the judge would have refused jurisdiction to relieve her from an intolerable situation. It is doubtful even whether the much maligned decision of Jeune P. in *Roberts v. Brennan*³ was incorrect. In that case:

A woman, whose domicil was probably English,⁴ went through a ceremony of marriage in the Isle of Man with a man domiciled in Ireland. The man was admittedly married to a wife still alive. The woman petitioned the English court for a decree of nullity on the ground of bigamy. At the time of the petition the man was resident in Ireland, but the reports of the case divulge nothing certain about the

¹ Dicey, p. 252; 61 *L.Q.R.* 343 (Morris). It is respectfully submitted that Mr. Cross is correct when he says: 'The logical consequence of the above argument [i.e. that the court may pronounce upon the invalidity of a marriage if the question arises incidentally to other proceedings] is that there should be no rules as to jurisdiction in the case of a void marriage, and it is submitted that this is sound in principle'; Dicey, p. 253, note 44.

² [1945] 2 All E.R. 690; *infra*, p. 355.

³ [1902] P. 143; 18 T.L.R. 467; 71 L.J. (P.) 74. The various reports conflict to a considerable extent; see the remarks of Lord Greene in *De Reneville v. De Reneville* [1948] P. 100, at pp. 116-17.

⁴ She was born in Wales.

residence of the petitioner, except that in the original citation she had given an English address.

Jeune P. granted a decree, remarking that 'residence—not domicil—is the test of jurisdiction in a nullity case'. He was clearly wrong in excluding domicil as a basis of jurisdiction.¹ He was also wrong if his statement implied that the residence of the petitioner alone is sufficient in the case of a voidable marriage. Nevertheless, it is scarcely rational or helpful to maintain that he lacked jurisdiction to record the non-existence of a marriage that by the admission of the respondent himself had in fact never been contracted. However, the doubt still exists and it cannot be denied that according to Lord Greene² the residence of a petitioning wife is insufficient at common law to found jurisdiction, unless, indeed, he intended to limit his observation to the case of a voidable marriage.³

(c) *Petition based on English place of ceremony.* It is well established by a series of decisions dating back to 1860 that the celebration of a void, as distinct from a voidable, marriage in England is in itself sufficient to confer nullity jurisdiction upon the English court, notwithstanding that the respondent is resident and domiciled abroad.⁴

In *Simonin v. Mallac*:⁵

A Frenchwoman domiciled in France had been married in London to a Frenchman, also domiciled in France. She petitioned for nullity on the ground that the marriage had been celebrated without the parental consent and the formal publication required by French law.

In the words of the Judge Ordinary, Sir Cresswell Cresswell, the court possessed jurisdiction on the simple ground that 'the parties by professing to enter into a contract in England, mutually gave to each other the right to have the force and effect of that contract determined by an English tribunal'.

¹ *Graham v. Graham*, [1923] P. 31, 37, *per* Horridge J.

² *De Reneville v. De Reneville*, [1948] P. 100, 116.

³ *Ibid.*, at p. 117. The Royal Commission on Marriages and Divorce has recommended that the English court shall have jurisdiction in respect of a void marriage 'if the petitioner is in England at the commencement of the proceedings'; Cmd. 9678, pp. 233, 394.

⁴ *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; *Sottomayor v. De Barros* (No. 1) (1877), 3 P.D. 1 (consanguinity); *Cooper v. Crane*, [1891] P. 369 (coercion affecting consent); *Linke v. Van Aerde* (1894), 10 T.L.R. 426 (bigamy); *Ogden v. Ogden*, [1908] P. 46 (claimed to be void for want of parental consent); *Valier v. Valier* (1925), 133 L.T. 830 (mistake as to nature of ceremony); *Hussein v. Hussein*, [1938] P. 159 (duress); *Srini Vasan v. Srini Vasan*, [1946] P. 67 (bigamy).

⁵ *Supra*.

(2) *Choice of law.*

One of the long-standing blemishes of this branch of private international law has been the almost complete disregard of the elementary and primary distinction between jurisdiction and choice of law. The tendency of the judges, after surmounting the problem of jurisdiction, has been to apply the internal law of England as a matter of course. Not only does this mean that the principles upon which the choice of law depends are undeveloped, but it is particularly regrettable that the personal law should be deprived of its control over the married status. In *Easterbrook v. Easterbrook*,¹ for instance, the judge assumed jurisdiction apparently on the ground that the parties, though domiciled in one of the provinces of Canada, were resident in England, and then proceeded to annul their voidable marriage on a ground that was sufficient by English law but insufficient in any of the Canadian provinces. The justification probably was that he had no option, since evidence of Canadian law was not given. But the practice of presuming English and foreign law to be similar unless evidence to the contrary is offered threatens the principle that questions of status are subject to the law of the domicile, for by remaining silent the parties may be able to obtain annulment on easier terms than are allowed by that law. Knowledge of foreign law certainly cannot be imputed to the judge, but there is no reason why notice of the expediency of calling for evidence of it should not be imputed to him.²

Distinction
between
choice of
law and
jurisdiction
generally
neglected

The ascertainment of the proper law in a nullity suit depends upon analysing the various defects that may constitute cause for annulment, in order to determine their intrinsic nature. Once this is done, the legal system to which a particular defect is subject will become reasonably apparent. The analysis must turn in the first place upon the distinction between the contract

Proper law
depends
upon
nature of
alleged
defect

¹ [1944] P. 10. Similarly, *Hutter v. Hutter*, [1944] P. 95. See also *Ramsay-Fairfax v. Ramsay-Fairfax*, [1956] P. 115, *supra*, p. 346, where the court at the instance of the wife annulled a voidable marriage between parties resident in England, but domiciled in Scotland, although the husband had started like proceedings in Scotland. Presumably, the wife desired an English decree because she was entitled to maintenance in England but not in Scotland. In the court below, [1956] P. 115, at p. 125, Willmer J. dealt specifically with the present contention, but in the circumstances he found the question of choice of law to be of no consequence since he had been satisfied by an affidavit of a Scots lawyer that 'in relation to such proceedings as these, Scots law—i.e. the law of the domicile—is the same as English law'.

² See the remarks of Falconbridge, 26 *Canadian Bar Review*, 915.

to marry and the status that emerges from the contract when it is implemented. It is a trite saying that marriage is an institution, not a contract, but the aphorism must not be allowed to obscure the equally obvious truth that the institution originates in a contract properly so called. The distinction requires emphasis in the present connexion, for in the English view the contract is governed in general by the *lex loci celebrationis*, while the ensuing status is a matter for the personal law. Thus the primary task is to separate the contractual defects from those, such as wilful refusal to consummate the marriage, that affect the status.

Defects are
either con-
tractual or
personal

But the analysis must be carried further, for, if the *lex loci celebrationis* as such is to govern the contract, it is obvious that, since the parties may have no permanent or substantial connexion with the place of marriage, alleged defects which raise the question of their capacity for intermarriage, though certainly of a contractual nature, can scarcely be referred as a matter of course to the *lex loci*. Defects affecting the validity of the contract and the ensuing ceremony in which the identity of the actual parties is a matter of indifference, must be distinguished from those that affect the parties personally.

The former, such as want of form and probably also want of consent, are subject to the *lex loci celebrationis* and for the present purpose may conveniently be denominated 'contractual'. On the other hand, defects which consist in something peculiar to those very parties or to one of them, such as nonage, are subject to the personal law and may themselves be termed 'personal'.

Lack of
correct
formalities
is a con-
tractual
defect

What defects are to be classified as contractual is not entirely free from doubt. It is clear, of course, that a failure to observe the prescribed formalities at the marriage ceremony is comprised in this class.¹ In the words of Cotton L.J.:

"The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but as in other contracts, so in that of marriage, personal capacity must depend on the law of the domicile."²

Is absence
of consent
a con-
tractual or
personal
defect?

The doubtful question is whether contractual defects are restricted to those affecting the mere form of the ceremony. It is submitted, however, that anything which negatives the free consent that is a fundamental requirement of general contract

¹ *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67.

² *Sottomayor v. De Barros* (No. 1) (1877), 3 P.D. 1, 7.

law must also be classed as contractual. According to this, the question whether annulment is to be decreed on the ground that the petitioner was the victim of fraud, coercion or fear,¹ or was mistaken with regard either to the identity of the respondent or the nature of the marriage ceremony, falls to be determined by the *lex loci celebrationis*. Thus in *Mehra v. Mehra*:²

The petitioner, a woman domiciled in England, went through a ceremony of marriage in Bombay with the respondent, who was domiciled in India. The petitioner believed that the only purpose of the ceremony, which was carried out in a language unknown to her, was to convert her to the Hindu faith. Afterwards she learned that her conversion and marriage were effected at the same time.

Barnard J. held that she did not intend to marry the respondent, that a fraud had been perpetrated upon her and that therefore she must be granted a decree of nullity. Unfortunately it cannot be predicated that the learned judge treated the defect as contractual, for he did not inquire whether the mistake would be regarded by the *lex loci celebrationis* as sufficient ground for relief. A not unreasonable conclusion, however, is that he presumed Indian and English law to be the same on the matter.

But the view that a mistake affecting consent is a contractual defect was certainly not accepted by Hodson J. in *Way v. Way*,³ Doubt raised by *Way v. Way* the case of the Russian wife who was forbidden by the Soviet authorities to join her husband in England.

The petitioner, a British subject domiciled in England, went through a ceremony of marriage at Archangel with the respondent, domiciled in Russia, as the result of which he believed that he had been legally married. He later claimed annulment on the grounds, (1) that certain formalities required by Russian law had been omitted, (2) that the marriage was void for want of consent, since he believed at the time of the ceremony that his wife would be allowed to accompany him to England and also that it was the duty of both parties to live together. According to Russian law he was mistaken in both respects.

Hodson J. first held that there had been no neglect of the Russian formalities. He then propounded the doctrine that 'questions of consent are to be dealt with by reference to the personal law of the parties rather than by reference to the law of the place where the contract was made', with the result that 'the matrimonial law of each of the parties' had to be applied.⁴

¹ *H. v. H.*, [1954] P. 258.

³ [1950] P. 71.

² [1945] 2 All E.R. 690.

⁴ At p. 78.

He then held that by English law, the personal law of the petitioner, consent is not nullified by mistake of the kind pleaded, a finding with which it is impossible to disagree.

The Court of Appeal¹ held the marriage to be void on the ground that the Russian formalities had not been observed, and therefore anything that was said about the law to govern the question of consent was *obiter*. Bucknill L.J. and Denning L.J. made no reference to the matter, but Sir Raymond Evershed M.R. was 'prepared to assume' that Hodson J. was correct in referring the question to the personal law of the parties.²

Submitted
that want
of consent
is a con-
tractual
defect

To classify want of consent as a personal defect and to assign it to the law that governs status seems utterly wrong on principle. A valid agreement by the parties to go through a marriage ceremony is an essential preliminary to the creation of the married status. Fundamental error nullifies not only the agreement, but also the ceremony in which it finds its fulfilment, and whether the facts disclose error of that nature must surely be a matter for the law that governs the ceremony, i.e. the law that determines whether a ceremony sufficient to effect a change of status has been effected.³

Meaning of
'personal
law'

It remains to identify the personal law which governs personal, as distinct from contractual, defects. It seems clear that it must be the law that governs capacity to marry, for, with the exception of absence of consent if that is to be included in the present category, all the personal defects represent an incapacity in one or both of the parties. There is no need to discuss further the controversial question of capacity, but it is as well to repeat that, at least according to the latest dicta, the governing law is the law of the intended matrimonial home, which is presumed to be the law of the country in which the husband is domiciled at the time of the marriage. The most decisive statement to this effect is contained in the following passage from Lord Greene's judgment in *De Reneville v. De Reneville*:⁴

'In my opinion the question whether the marriage is void or merely voidable is for French law to answer. My reasons are as follows: The validity of a marriage so far as regards the observance of formalities is a matter for the *lex loci celebrationis*. But this is not a case of forms.⁵ It is

¹ *Sub nom. Kenward v. Kenward*, [1951] P. 124.

² At p. 133.

³ For a strong view to the contrary see 3 *I. & C.L.Q.R.* 454 et seqq. (J. T. Woodhouse). It should also be noticed that the Royal Commission on Marriage and Divorce recommends that only lack of formalities should be regarded as a contractual defect; Cmd. 9678, pp. 234, 395.

⁴ [1948] P. 100, 114. For the facts see *supra*, p. 342. ⁵ Italics supplied.

a case of essential validity. By what law is that to be decided? In my opinion by the law of France, either because that is the law of the husband's domicile at the date of the marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage.'

The crucial sentence in this passage is that which has been italicized, for at first sight the meaning of the word 'this' is not obvious. It is submitted that it clearly means—*this defect*.¹ Interpreted more fully, Lord Greene's line of thought appears to have been as follows:

Effect of
De Reneville v. De Reneville

Whether a marriage is void or voidable depends in the first place upon the particular defect alleged by the petitioner, since the nature of this will determine the identity of the proper law. If the defect consists in lack of form, the proper law is the *lex loci celebrationis*.

But in the present case the alleged defect is inability or refusal to consummate the marriage, and since this raises a question of essential validity the proper law is the law of France, in which country the husband was domiciled at the time of the marriage.

It is pertinent to remark that if chaos is to be avoided in a nullity suit the personal law must be represented by a single legal system, not by the ante-nuptial *lex domicilii* of each party. It is required to answer two questions:

Essential
that per-
sonal law
should be
a single
system

First, does the alleged defect constitute cause for annulment?

Secondly, if so, what consequences ensue, presuming the allegation to be proved?

The first question might be referred to two laws, but scarcely the second. Suppose, for example, that a woman, domiciled in England prior to her marriage to a man domiciled in Switzerland, alleges that the latter was mentally defective at the time of the marriage. Both English and Swiss law recognize mental infirmity as ground for annulment, but the effect in Switzerland is to render the marriage void, not voidable as in England.² If a judge, confronted with this problem, were required to apply the dual domicile theory, how could he reach a decision without choosing either Swiss or English law and upon what basis would he be expected to make the choice?

¹ See the remarks of Mr. P. B. Carter in 31 *Journal of Comparative Legislation and International Law*, 92-93 (Nov. 1949).

² Wolff, *Private International Law* (1st ed.), citing Swiss Civil Code, ss. 16, 97, 102, no. 2.

Time for
fixing per-
sonal law
is time of
marriage

It must be noticed that the decisive date for ascertaining the personal law is the time of the marriage, not the time of the nullity proceedings, for annulment, unlike divorce, is founded upon an ante-nuptial fact.¹ This is so even though the alleged defect is the post-nuptial fact of wilful refusal to consummate the marriage.² This equation of wilful refusal and impotence is often justified on the ground that the former is in essence an ante-nuptial act, since in the case of the husband it is generally a veil concealing impotence, and in the case of the wife it represents unconquerable aversion.³

A statutory
rule for the
choice of
law

The Matrimonial Causes Act, 1950, provides that where a nullity suit is brought in England by a wife, either because she has been deserted by her husband, who was domiciled in this country immediately before the desertion,⁴ or because she has been ordinarily resident in England for a period of three years immediately preceding the suit,⁵ then

‘the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings’.⁶

It would seem that this creates no exception to the rules for the choice of law stated above. The common domicile at the time of the proceedings vitally affects the question of jurisdiction, but it is no pointer to what was the proper law at the time of the marriage. Whatever it is that renders the court competent—common domicile, common residence or the domicile of the petitioner alone—the alleged defect must still be assigned to its proper law, which may well be the law of a foreign country.

3. *Foreign Suits*

(1) *Jurisdiction of foreign courts.*

Doubtful
if English
and foreign
courts are
on the same
footing

If the law is to be a harmonious whole it seems essential that what is regarded as sufficient to confer jurisdiction upon the English court should be equally effective in the case of foreign courts. It is not clear, however, that this is true. For one thing, the demands of reciprocity have not always impressed English judges; for another, the relevant decisions are few in number

¹ 11 M.L.R. 101.

² *Robert v. Robert*, [1947] P. 164, 167–8.

³ Wolff, *Private International Law*, p. 337, citing *G. v. G.*, [1924] A.C. 349. A different view is expressed by Falconbridge, 26 *Canadian Bar Review*, 920.

⁴ *Supra*, p. 343.

⁵ *Supra*, p. 347.

⁶ Matrimonial Causes Act, 1950, s. 18 (3).

and not wanting in ambiguity. It will be better, therefore, to retain the arrangement followed in the discussion of English jurisdiction and attempt to ascertain whether the authorities justify the conclusion that English and foreign courts stand on the same footing.

(i) *Annulment of voidable marriages.*

(a) *Jurisdiction based on domicile.* The decision of the House of Lords in *Salvesen v. Administrator of Austrian Property*¹ established beyond all doubt that the court of the country in which both parties are domiciled at the time of the proceedings has jurisdiction to pronounce a decree of nullity.²

Court of common domicile competent

There can, of course, be no question of a foreign jurisdiction based on the separate domicile of the wife, for in the case of a voidable marriage she necessarily shares the domicile of her husband. We have seen, however, that in two sets of circumstances a wife may petition the English court for annulment notwithstanding the foreign domicile of her husband,³ and the question therefore arises whether a foreign decree, based on a substantially similar jurisdictional ground, will be recognized on the principle of reciprocity. This problem of reciprocal recognition, which assumes greater importance in the sphere of divorce, will be discussed later.⁴

Does the prior domicile of deserted wife found jurisdiction?

(b) *Jurisdiction based on residence.* Since it has now been held that the common residence of the parties in England suffices to found the nullity jurisdiction of the English court,⁵ it may be taken for granted, in accordance with the principle of reciprocity, that a foreign decree based upon a similar assumption of jurisdiction will be recognized. This conclusion, indeed, was virtually established by the earlier case of *Mitford v. Mitford*.

Common residence sufficient

On the other hand, having regard to *De Reneville v. De Reneville*,⁷ it is clear that at common law a foreign decree founded on the residence of the petitioner alone will not be recognized as valid by English law. The one doubt in this respect is whether a decree granted to the wife by reason of her residence in the forum for a limited period will be honoured in

Residence of petitioner alone insufficient

¹ [1927] A.C. 641; for the facts see *infra*, p. 360.

² *De Reneville v. De Reneville*, [1948] P. 100, 109, *per* Lord Greene.

³ Matrimonial Causes Act, 1950, S. 18 (1) (a); 18 (1) (b); *supra*, pp. 343, 347.

⁴ *Infra*, pp. 376-8.

⁵ *Ramsay-Fairfax v. Ramsay-Fairfax*, [1956] P. 115.

⁶ [1923] P. 130; *infra*, p. 364.

⁷ [1948] P. 100; *supra*, p. 342.

England, having regard to the statutory jurisdiction possessed by the English court to grant her relief if she has been resident in the country for three years.¹

Place of marriage no basis of jurisdiction (c) *Jurisdiction based on place of marriage*. It may be affirmed without hesitation, after the decision of the Court of Appeal in *Casey v. Casey*,² that the foreign annulment of a voidable marriage based solely upon the marriage of the parties in the forum will not be recognized by the English courts.

(ii) *Annulment of void marriages*.

Common domicil founds jurisdiction (a) *Jurisdiction based on domicil*. In *Salvesen v. The Administrator of Austrian Property*,³ the House of Lords held that jurisdiction in the international sense is possessed by the courts of the foreign country if the parties to a void marriage are both domiciled there at the time of the suit. This common domicil will not, of course, exist unless the woman has by residence acquired a domicil of choice in the forum, for her previous domicil is unaffected by a marriage that is void.⁴ In the *Salvesen Case*:

Miss Salvesen, a British subject domiciled in Scotland, went through a form of marriage at Paris in 1897 with an Austrian subject. The parties lived together as man and wife at Wiesbaden until 1923, except for the period of the 1914 War, and they each acquired a German domicil. In 1923 the English Administrator of Austrian Property claimed the movables of the wife on the ground that she had become an Austrian subject by her marriage. She therefore took steps to discard her Austrian nationality by suing for nullity at Wiesbaden on the ground that certain formalities required by French law had been omitted from the marriage ceremony in Paris. The court granted the decree.

The House of Lords held that the decree was effective in Scotland. The court of the common domicil, though perhaps its jurisdiction may not be exclusive,⁵ is certainly competent to determine conclusively and finally a question relating to the status of the parties. In *De Massa v. De Massa*⁶ and in *Galene v. Galene*⁷ this principle was applied to cases where the court of the common foreign domicil had annulled a marriage for the non-observance of the domiciliary forms, although the parties had married in England in faithful compliance with the English formalities.

¹ *Matrimonial Causes Act*, 1950, s. 18 (1) (b). As to this, see *infra*, pp. 376-8.

² [1949] P. 420; *supra*, p. 348.

³ [1927] A.C. 641.

⁴ *Supra*, p. 340.

⁵ *Per* Lord Haldane, at pp. 652, 654.

⁶ (1931), reported in [1939] 2 All E.R. 150 N.

⁷ [1939] P. 237.

In deciding whether the parties were in fact both domiciled in the foreign forum at the time of the nullity proceedings, it is vital that the English court should have regard to the appropriate rule for the choice of law governing the formal validity of the marriage. This is well illustrated by *Chapelle v. Chapelle*.¹

Place of
common
domicil
may depend
upon rule
for choice
of law

A woman domiciled in England was married in 1931 at a register office in England to a man domiciled in Malta. The Maltese court in 1944, in a suit brought by the husband, pronounced the marriage to have been null and void *ab initio*, since there had been no religious ceremony as required by the *lex domicilii* of the husband.

In proceedings taken later in England it was argued *inter alia* that the Maltese domicil of the husband was automatically communicated to the wife by the mere fact of the marriage and that therefore the nullity decree was effective as having been granted by the court of the common domicil. Willmer J., however, held that it was impossible to attribute to the marriage a change in the woman's domicil, since the Maltese court itself had declared that the parties had never been married. The all-important question of choice of law, however, was not fully canvassed. A void marriage admittedly does not effect a change in the woman's domicil, but in the instant circumstances it is submitted with respect that the marriage was valid, not void. This has been demonstrated by a learned commentator.²

The invalidity of the marriage was alleged to be due to a contractual defect, namely, a failure to observe the correct formalities. The proper law to govern this matter was English law as being the *lex loci celebrationis*. Since the English formalities had been observed, the marriage was valid and the wife acquired by operation of law a common domicil with her husband.

The question that still lacks a judicial answer is whether, in the case of a void marriage, English law admits the international validity of a nullity decree granted by the court of the country in which the petitioner, but not the respondent, is domiciled.

Is domicil
of peti-
tioner alone
a basis of
jurisdic-
tion?

If, for instance, in *Chapelle v. Chapelle*¹ the English formalities had not been observed, with the result that the husband alone was domiciled in Malta, would the Maltese decree have been effective?

Willmer J. virtually answered this question in the negative, for he said that the possession by the parties of a common Maltese domicil was 'the *one and only* ground on which the

¹ [1950] P. 134.

² Mr. Rupert Cross, 3 *I.L.Q.R.*, pp. 249-50.

claim to exercise jurisdiction over the wife could be based'.¹ The opinion of the learned judge, however, is not decisive, for the claim that the domicil of the husband at the time of the Maltese suit was alone sufficient to found jurisdiction was not put forward.

Peti-
tioner's
domicil
presumably
sufficient

It is submitted that cogent reasons can be advanced in favour of conceding jurisdiction to the court of the domicil of the petitioner alone. In the first place, the English court assumes jurisdiction on this ground,² and it seems a little incongruous, to say the least, that the equivalent right of foreign courts should be denied. Again, if a void marriage is a complete nullity and can be so treated by every court and every private person, what possible reason can there be for refusing recognition to a decree recording its non-existence and granted in the domicil of one of the parties?³ It smacks of pedantry to reject the declaration of an admitted truth. Further, on mere sociological grounds recognition of the foreign decree seems imperative, for its repudiation creates yet another instance of that lamentable situation in which the parties are regarded as married in one country but unmarried in another.⁴ Finally, it is not without significance that in a case where the facts were similar to those in *Chapelle v. Chapelle* a South African court had no hesitation in recognizing the foreign decree.⁵

Residence
in the
forum of
petitioner
semble
sufficient

(b) *Jurisdiction based on residence.* It may be assumed with some confidence that the foreign annulment of a void marriage, based on the local residence of both parties or of the petitioner alone, will be regarded in England as a decree given by a court of competent jurisdiction. In the first place, since Sir Henry Duke in *Mitford v. Mitford*⁶ recognized the annulment by a German court of a voidable marriage which was based on the residence of both parties in Germany, then *a fortiori* the same basis of jurisdiction must be admitted in the case of a void marriage. Secondly, the reasons already given in favour of admitting the jurisdiction of the English court in respect of a void marriage, even though the petitioner alone is resident in England, apply *mutatis mutandis* to a suit abroad and their repetition here would be without profit.⁷

¹ At p. 144.

² *White v. White*, [1937] P. 111, as explained in *De Reneville v. De Reneville*, [1948] P. 100, at p. 113; *Mehta v. Mehta*, [1945] 2 All E.R. 691; *supra*, p. 355.

³ 3 I.L.Q.R. 253.

⁵ *De Bono v. De Bono* (1948), S.A.L.R. 802

⁶ [1923] P. 130; *infra*, p. 364.

⁴ *Ibid.*, at p. 252.

⁷ *Supra*, pp. 350-2.

(c) *Jurisdiction based on place of marriage.* The mere fact that a marriage was celebrated in England confers jurisdiction upon the English court to annul a void marriage.¹ It is, therefore, a little embarrassing to reject the equivalent right of the courts of a foreign *locus celebrationis*. There is, however, no clear authority to this effect,² but in a modern case Somervell L.J. admitted the convenience of conceding jurisdiction to the courts of the place of marriage where the validity of the marriage ceremony is in issue.³ Should the matter call for a decision, it is to be hoped that the court will be imbued with a spirit of reciprocity.

Undecided whether place of marriage founds jurisdiction

(2) *Choice of law.*

The question may be put whether the failure of a foreign court of competent jurisdiction to apply the appropriate rule for the choice of law as understood in England renders its decree ineffective. This much, at any rate, is clear, that a nullity decree in respect of either a void or a voidable marriage, if given by the court of the common domicile, must be recognized whatever rule for the choice of law may have been applied. *De Massa v. De Massa*⁴ is a striking illustration of this:

Decree in common domicile effective, though proper law not applied

A marriage solemnized in due form at the Paddington Registry Office, between parties who were French by nationality and by domicile, was annulled in France on the grounds that:

- (a) the petitioner had not obtained the parental consent required by French law; and
- (b) the marriage had not been recorded in the French register.

Lord Merrivale accepted the French decree as binding. 'A French tribunal', he said, 'of competent jurisdiction has annulled the marriage and that declaration of nullity comes into operation.' He was not disturbed by the fact that the French court had ignored the fundamental rule that the *lex loci celebrationis* governs the form of the marriage ceremony.

There is nothing startling in this decision. It complies with the established rule that a foreign judgment, if given by a court possessing jurisdiction in the international sense, is binding in England and cannot be impeached on its merits.⁵ When sued

Merits of decree in common domicile cannot be impeached

¹ *Supra*, p. 352.

² The cases usually cited, *Scrimshire v. Scrimshire* (1752), 2 Hagg. Cons. 395; *Sinclair v. Sinclair* (1798), 2 Hagg. Cons. 294; *Mitford v. Mitford*, [1923] P. 130, are not decisive.

³ *Casey v. Casey*, [1949] P. 420, 433.

⁴ (1931), reported [1939] 2 All E.R. 150 N; *Morris*, p. 119; followed in *Galene v. Galene*, [1939] P. 237.

⁵ *Infra*, p. 630.

upon in this country it cannot be successfully attacked on the ground that the court mistook or misapplied the relevant legal system, whether English or foreign.¹ The decisive factor is the jurisdiction of the foreign court. In the case of a suit *in rem*, jurisdiction resides in the court of the country where the *res* is situated.² A nullity suit is a proceeding *in rem* and it cannot be gainsaid that the *res*, to wit the marriage, is situated in the country in which both parties are domiciled.

Is the same true of decrees given in country of residence? Doctrinal theory, however, is not so easily satisfied when the decree has been given by some court other than the court of the common domicil, as for example by the court of the common residence of the parties.³ This extension of jurisdiction from domicil to residence is no doubt convenient, but doctrinally it is vulnerable, for if the test of jurisdiction in proceedings *in rem* is the situation of the *res*, is it logical to ascribe to the marriage, albeit a disembodied *res*, a simultaneous situation in more countries than one? That logic is not always a sure guide, however, is best illustrated by *Mitford v. Mitford*,⁴ where the facts were as follows:

Mitford v. Mitford
admits
sufficiency
of common
residence

Mitford, domiciled in England, was married in Berlin to a woman with a German domicil. After six months of married life his wife obtained a nullity decree from the Berlin court on the ground of error under article 1333 of the German civil code. This provides that the validity of a marriage may be disputed by a spouse who, at the time of the ceremony, is mistaken as to such personal attributes of the other spouse as would have prevented him or her, with an intelligent appreciation of the significance of matrimony, from contracting the marriage. The particular attributes of which Mrs. Mitford complained were the masculine indolence and the unbearable selfishness of her husband. The effect in German law of this *error qualitatis* is to render the marriage voidable. The wife married again, whereupon Mitford petitioned the English court for divorce because of her bigamy and adultery.

The first question on these facts, whether the German court possessed nullity jurisdiction by virtue of the common residence of the parties, was answered in the affirmative by the President. The second question was whether the decree, given for a reason manifestly insufficient by the English law of the domicil, was to be recognized as valid. Was an alteration of status, inadmissible by the personal law, to be permitted merely because it had been

¹ *Godard v. Gray* (1870), 6 Q.B. 139, *infra*, p. 632.

² *Supra*, p. 109; *infra*, pp. 625-6.

³ *Supra*, p. 359.

⁴ [1923] P. 130.

effected by a court of competent jurisdiction? The President again gave an affirmative answer. He took the line that the decree, being a judgment of a competent court, was as conclusive as a like judgment in any other civil proceedings, that is to say, its propriety and correctness could not be impeached, for it is a settled rule of English private international law that foreign judgments are not void even though erroneous.¹ He said:

'The . . . real ground of challenge seems to me to be that . . . the decision was wrong on the merits. Into that question I am, as I think, not entitled to go.'²

It is true that in the view of the learned judge the correct rule for the choice of law had been applied by the German court, for rightly or wrongly he equated the mistake of the wife with an initial absence of consent—a contractual defeat that in his opinion fell to be tested by the *lex loci contractus*. The following hypothetical case will perhaps demonstrate the difficulty in a more acute form.

A Cypriot, a member of the Greek Orthodox Church, marries an Englishwoman in London in due compliance with the English formalities. The parties have been domiciled in England since the ceremony, but for the last six months they have resided in Malta. The Maltese court grants a decree of nullity on the ground that a Greek priest was not present at the marriage ceremony.

Is this decree, granted in defiance of the rule that English law governed the form of the ceremony, to be recognized as valid? It would seem, despite *Hay v. Northcote*,³ that the doctrine which forbids the impeachment of a foreign judgment must prevail, and that the validity of the decree must be acknowledged. In short, if English law admits the jurisdiction of the court of the common residence, it must abide by the consequences, however erroneous the decree may be.

Seemle,
erroneous
decrees not
impeach-
able

B. SUITS FOR DISSOLUTION OF MARRIAGE⁴

(a) *Jurisdiction of English courts.* (The test of jurisdiction for the purpose of granting divorce was not unequivocally established until the decision of the Privy Council in *Le Mesurier v.*

Jurisdic-
tion
formerly
based on
residence
short of
domicil

¹ *Infra*, pp. 630-2.

² [1923] P., at p. 142.

³ [1900] 2 Ch. 262; see the criticism in Dicey, pp. 382-3.

⁴ By English law, divorce may be granted at the instance of either husband or wife when the respondent has (a) committed adultery or (b) deserted the petitioner without cause for at least three years immediately preceding the presentation of the petition or (c) treated the petitioner with cruelty, or (d) is incurably of

Le Mesurier in 1895.¹ There was a tendency before that time to propound a doctrine of matrimonial domicile, an expression which was intended to indicate, not residence in a country with a present intention of remaining there indefinitely, but the actual residence of the spouses for the time being, provided that it was neither casual nor for the mere purpose of travel. Thus in *Niboyet v. Niboyet*,² which was decided in 1878, a Frenchman, who had been married to an Englishwoman at Gibraltar in 1856, resided in England as French Consul from 1862 to 1869, and again from 1875 until the presentation by his wife of a petition for divorce on the ground of his adultery. His consular office precluded him from acquiring an English domicile. A majority of the Court of Appeal, Brett L.J. dissenting, held that there was jurisdiction to dissolve the marriage. The reasoning appears to have been that, since the husband was resident in England, his adultery was a matrimonial matter that would have entitled the ecclesiastical courts before 1857 to exercise jurisdiction in a suit for divorce *a mensa et thoro*, and that the jurisdiction, enlarged by the new remedy of divorce, was exercisable by the civil court.

One fallacy at least in this reasoning was that what gave jurisdiction in the matters cognizable by the ecclesiastical tribunals would not affect the entirely new power of dissolution that had been created by the Act.

Domicil is
now the
only test of
jurisdiction

However, the doctrine that residence short of domicile suffices to render an English court competent to decree divorce was definitely and finally exploded by the decision of the Privy Council in *Le Mesurier v. Le Mesurier*.³ That case decided that domicile, in the true and full sense of the term, of the husband at the time of the suit is the sole test of jurisdiction. With such domicile the court has jurisdiction over a foreigner as well as over a British subject; without such domicile it has no jurisdiction, even though the parties are British subjects.⁴

unsound mind and has been continuously under care and treatment for at least the last five years; and at the instance of the wife if the husband since the marriage has been guilty of rape, sodomy, or bestiality; Matrimonial Causes Act, 1950, s. 2 (2).

¹ [1895] A.C. 517.

² (1878), L.R. 4 P.D. 1; Morris, p. 94.

³ [1895] A.C. 517. Other authorities are: *Wilson v. Wilson* (1872), L.R. 2 P. & D. 435; *Goulder v. Goulder*, [1892] P. 240; *Lord Advocate v. Jaffrey*, [1921] 1 A.C. 146; *A.-G. for Alberta v. Cook*, [1926] A.C. 444; *H. v. H.*, [1928] P. 206.

⁴ *Niboyet v. Niboyet* (1878), 4 P.D. 1, 19, per Brett L.J. diss.

*Travers v. Holley*¹ seems clearly to support the view that the critical moment at which the test of domicile must be satisfied is the time when the proceedings are commenced, not at the later time when the case is tried. If the rule were otherwise, indeed, a husband would be able to frustrate his wife by changing his domicile between the presentation of her petition and the hearing of the case. Further, to regard the critical time as the time of the trial and judgment, if pressed to its logical conclusion, might lead to absurdity, for a husband of sufficient wealth and malice would be able to defeat his wife in perpetuity. An act in the law, once duly effected, must be allowed to operate.²

Time at which common domicile must exist

Since a wife takes the domicile of her husband upon marriage, the sole question in each case is whether the husband is domiciled in England at the time of the suit. Nothing else is relevant. The nationality of the parties, their residence,³ their submission to the jurisdiction,⁴ their former domicils, or the fact that they were domiciled elsewhere when the misconduct upon which the suit is founded occurred⁵—none of these is pertinent to the existence of jurisdiction.

Domicil of husband alone considered

Moreover, it is impossible for the wife to acquire during the subsistence of the marriage a different domicile from that of her husband.⁶ Even a decree of judicial separation does not confer this liberty upon her.⁷ It thus follows that a wife is incapable at common law of obtaining relief in the shape of a divorce from the English court unless she can show that her husband is at present domiciled in England. This doctrine has produced the problem of the deserted wife. A domiciled Englishwoman, for instance, marries in England a man domiciled abroad, but after a period of cohabitation with his wife the husband forms an adulterous union with another woman and leaves the country with her. The wife is confronted with a distressing and a formidable problem. Since she necessarily retains the domicile of her husband, her only remedy lies in the

The problem of the deserted wife

¹ *Infra*, p. 377.

² The view in the text is supported by *Balfour v. Balfour*, [1922] W.L.D. 133 (South Africa); and by certain Australian decisions, but is repudiated by *Kerrison v. Kerrison* (1952), 69 W.N. (N.S.W.), 305. For a discussion of these cases and of the subject generally see 2 *I. & C.L.Q.R.* 303-8 (J. G. Fleming).

³ *Le Mesurier v. Le Mesurier*, [1895] A.C. 517.

⁴ *Harriman v. Harriman*, [1909] P. 123, 131, 142, 144; *Hyman v. Hyman*, [1929] P. 1, 31; *Armitage v. A.-G.*, [1906] P. 135, 140.

⁵ *Wilson v. Wilson* (1872), L.R. 2 P. & D. 435.

⁶ *Supra*, p. 186.

⁷ *A.-G. for Alberta v. Cook*, [1926] A.C. 444.

country of that domicil. This may be at the other end of the world. It may be a country where divorce is not allowed at all, or not allowed for reasons that seem compelling to English eyes. Even the continued residence of the husband in England does not improve matters, much less mend them. If, to take the fact of the *Niboyet Case*,¹ the domiciled Frenchman lives in England in adultery for some twenty years, the English court is powerless to dissolve the marriage. The wife must face the trouble and expense of taking her chance in the French court. The same situation arises if the husband, though possessing an English domicil at the time of the marriage, has now acquired a fresh one abroad. Even worse, perhaps, is the case where he disappears completely, so that the wife, able and willing maybe to meet the expense of pursuit, cannot even ascertain her present domicil.

Tendency
of earlier
decisions
to give a
remedy by
relaxing
the general
principle

The judges several times expressed the view that a wife enmeshed in these difficulties should be allowed to claim her own separate domicil in England.² Sir Gorell Barnes, for instance, in *Bater v. Bater*³ put the position as follows:

‘In a case such as this it is said that the wife could maintain a suit in this country against a husband who has separated and gone to America and become domiciled there; and there are many cases in which that has been allowed in undefended cases. I am not at the present moment aware . . . how that matter would be treated if the case were really put on the domicil of the husband abroad. But in many of the undefended cases what happens is, that the wife is deserted in England. The husband goes to America, nothing is heard about him, and the court, in order to do justice, either acts upon the view that the husband has not come forward to prove another domicil, when he deserted his wife in this country; or, as some have thought, that a woman may be treated as having been left in a separate domicil of her own, and, to do justice, she is not bound to follow the husband all over the world from place to place, and so may get relief in this country.’

In the two cases of *Stathatos v. Stathatos*⁴ and *Montaigu v. Montaigu*⁵ these suggestions were translated into action. In the former:

A Greek, domiciled in Greece, married a Miss Henry, domiciled in England, at a Registry Office in London. Three years later he took her

¹ *Supra*, p. 366.

² *Niboyet v. Niboyet* (1878), 4 P.D. 1, 14; *Armystage v. Armystage*, [1898] P. 178, 185; *Bater v. Bater*, [1906] P. 209, 215-16; *Ogden v. Ogden*, [1908] P. 46, 82.

³ *Supra*, at pp. 215-16.

⁴ [1913] P. 46.

⁵ [1913] P. 154.

to Athens, but after about a year refused to live with her any longer and sent her back to England. He then obtained from a court at Athens a decree of nullity on the ground, inadequate according to English law, that there was no Greek priest present at the marriage ceremony in London.

The wife was here presented with a peculiarly intractable riddle. She could not petition for divorce in Greece, since her marriage was non-existent by Greek law;¹ she could not petition in England, since her domicil was Greek. *Bargrave Deane J.*, however, though admitting that he was infringing a well-established principle, and registering a pious hope that his decision would not be treated as a precedent, held that the wife possessed a domicil in England sufficient to enable her to obtain a divorce.

Despite these two decisions, however, the suggested doctrine that divorce might exceptionally be obtained in some country other than the true domicil of the husband was later repudiated. Though not directly in issue it was adversely criticized by the Privy Council in *A.-G. for Alberta v. Cook*² and was destroyed by the later decisions in *H. v. H.*³ and *Herd v. Herd*.⁴

Modern cases apply the test of domicil rigorously

In *H. v. H.* two domiciled English persons married each other in England in 1915, but were judicially separated six years later. The wife brought the present suit for divorce. The husband protested the jurisdiction on the ground that he was now domiciled in France. The wife pleaded that this defence was not open to him, her arguments being that a husband domiciled in England who deserts his wife is estopped from pleading a different domicil, and also that a wife so deserted is entitled to determine in what forum divorce proceedings shall take place.

Lord Merrivale overruled this plea and directed that an inquiry should be held to identify the husband's domicil. If this was French there could be no divorce proceedings in England. The learned judge affirmed once more that jurisdiction to decree divorce depends solely upon the actual domicil of the husband at the time of the proceedings, and that a man who deserts his wife in one domicil is not estopped from asserting that he has later become domiciled elsewhere. Statements such as those made by *Gorell Barnes J.*, that in undefended cases departures from strict principle had been tolerated in order to

¹ The nullity decree, though granted by the court of the common domicil, was not at that time regarded as effective in England. It would be so regarded now, *De Massa v. De Massa*, [1939] 2 All E.R. 150 N; *supra*, p. 363.

² [1926] A.C. 444.

³ [1928] P. 206.

⁴ [1936] P. 205.

afford a remedy to an afflicted wife,¹ were characterized as indicating merely the practice of the court and not a rule of law. In *Herd v. Herd*² it was held that the foreign domicil of the husband defeats the petition of the wife, even though the former does not protest the jurisdiction of the English court.

Cases in which deserted wife is relieved
In the last few years, however, certain developments, partly legislative partly judicial, have to a large extent mitigated the hardship suffered by a deserted wife. These changes in the law have already been discussed, but stated summarily they are as follows:

- (i) The wife can institute divorce proceedings in England notwithstanding the foreign domicil of her husband, if her husband has deserted her or has been deported from the United Kingdom, provided that he was domiciled in England immediately before the desertion or deportation;³ or if
- (ii) she is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, provided that her husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.⁴

Further,

- (iii) She is restored to the status of an unmarried person if her marriage has been annulled by the foreign court of the common domicil.⁵

Last,

- Where English domicil presumed to continue
- (iv) The hardship that arises from the total disappearance of the husband does not embarrass the wife's right of action if the last-established domicil was English, for, at any rate in undefended cases, the court is usually satisfied with a deposition that the domicil is unchanged. The existing domicil is presumed to continue, and the

¹ *Supra*, p. 368.

² [1936] P. 205.

³ Matrimonial Causes Act, 1950, s. 18 (1) (a); *supra*, p. 343. In at least six continental countries, in New Zealand, in each of the states of Australia, and in those provinces of Canada where divorce is recognized, a wife if deserted is allowed to petition, despite the lack of a separate domicil, for the purpose of obtaining matrimonial relief; 61 *L.Q.R.* 366-8.

⁴ Matrimonial Causes Act, 1950, s. 18 (1) (b); *supra*, p. 347.

⁵ *De Massa v. De Massa*, [1939] 2 All E.R. 150 N; *Morris*, p. 119; *Galene v. Galene*, [1939] P. 237; *supra*, p. 363.

onus of rebutting this lies on the party who alleges a change.¹

Another occasion on which an English court may dissolve a marriage between persons domiciled abroad arises where a suit is brought for a decree of presumption of death of one of the parties and for the dissolution of the marriage. Section 8 of the Matrimonial Causes Act, 1937, allowed any married person, who alleged reasonable grounds for supposing that the other party was dead, to petition the court not only to have it presumed that such party was dead, but also to have the marriage dissolved. Strictly speaking, once a person is dead in the eyes of the law, it is superfluous to dissolve his marriage, but nevertheless its express dissolution is desirable to meet the contingency of the presumption being in fact wrong. In *Wall v. Wall*,² the question arose whether this annexed power of divorce was exercisable in favour of a wife if her husband, when last heard of, was domiciled abroad. The answer depended upon whether the essential nature of a proceeding under the section was a suit for divorce. If so, the court had no jurisdiction. Pearce J. held, and it is respectfully submitted rightly so, that a petition for presumption of death is not in substance a petition for divorce.

Jurisdiction to grant decree of presumption of death and divorce

'In my view,' he said, 'relief under s. 8 is not primarily or in essence dissolution of marriage, and was not intended to be so. The dissolution was added as a safeguard. The risk that in certain cases the presumption may be incorrect so that the safeguard will then come into operation and effect an alteration of status in respect of a person domiciled abroad was not in my opinion intended by the legislature to deter this court from accepting jurisdiction and should not prevent its doing so.'³

The result was that jurisdiction was sufficiently founded upon the mere residence of the petitioner. This ruling might have embarrassing consequences if, for example, the petitioner were the wife of a man who when last heard of was domiciled in Scotland, for she might be able by crossing the border to obtain a divorce that would not be available to her under the Scottish statute, which is couched in different terms from those of its English equivalent.⁴ It is, perhaps, for some such reason that limitations were later put upon the jurisdiction of the English court.⁵ The present rule is that the court has jurisdiction

¹ Cp. *Hopkins v. Hopkins*, [1951] P. 116.

² [1950] P. 112.

³ *Ibid.*, at p. 125.

⁴ Divorce (Scotland) Act, 1938, s. 5.

⁵ Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (3) (b).

in proceedings for a decree of presumption of death and dissolution of marriage where

- (a) the petitioner is domiciled in England, or where
- (b) the wife petitioner is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings.¹

Service of
petition

A copy of every petition for divorce must be served personally or by registered post upon the respondent and every co-respondent,² and there is no need to obtain the leave of the court for service out of the jurisdiction.³ The court in its discretion, however, may dispense with service altogether if it seems necessary or expedient so to do.⁴ This discretion is unfettered, but it will be exercised in favour of the petitioner only in exceptional cases, as, for instance, when the possible methods of substituted service are likely to be ineffective.⁵

Jurisdiction over
co-respondent not
based on
domicil

The jurisdiction of the court over a co-respondent, guilty of adultery with a married woman, is wider than it is over the immediate parties to a suit for divorce, for it extends to every person, other than a foreign sovereign, regardless of his nationality, domicile or residence, provided that the petitioner and respondent are themselves domiciled in England.⁶ The co-respondent cannot claim to be dismissed from the suit on the ground that he is not domiciled in England, though, of course, if it should happen that he is resident abroad without possessing any assets in this country a judgment for damages given against him may be ineffective.

The Matrimonial Causes Act, 1950,⁷ provides that a husband may, on a petition for divorce or for judicial separation or *for damages only*, claim damages from any person on the ground of adultery with the wife of the petitioner. Such a claim is to be tried on the same principles as actions for criminal conversation were tried under the law before 1857.⁸ These actions were

¹ Matrimonial Causes Act, 1950, s. 16 (1); *ibid.* s. 18 (2). In order to determine whether a wife is domiciled in England for the purposes of this section, 'her husband shall be treated as having died immediately after the last occasion on which she knew or had reason to believe him to be living'; s. 16 (4).

² Divorce Rule 8 (1) (a).

³ Divorce Rule 10.

⁴ Matrimonial Causes Act, 1857, s. 42.

⁵ *Luccioni v. Luccioni*, [1943] P. 49 (no dispensation); *Weighman v. Weighman*, [1947] 2 All E.R. 852 (dispensation); *Paolantonio v. Paolantonio*, [1950] 2 All E.R. 404 (dispensation). *Spalenkova v. Spalenkova*, [1954] P. 141 (no dispensation).

⁶ *Rayment v. Rayment*, [1910] P. 271; *Rush v. Rush*, [1920] P. 242.

⁷ S. 30 (1).

⁸ *Ibid.*, S. 30 (2).

merely personal claims for a wrong, not complicated by questions of status,¹ and therefore a husband, so far as regards his right to sue the alleged adulterer in England for damages *simpliciter*, is in the same position as any other plaintiff in tort. If he has divorced his wife for adultery in the country of his foreign domicile, he may, notwithstanding that he is neither domiciled nor resident in England, maintain an action in the High Court to recover damages from the adulterer.²

Choice of Law. The questions that arise in a suit for divorce properly brought in this country are governed exclusively by English law. This decides whether there is good cause for divorce, and determines the form of relief and the conditions upon which the decree will be made. Any other legal system, such as the law under which the parties married, or their *lex patriae* or the law of the place where the matrimonial offence was committed, is completely irrelevant.

English law
applies
exclusively
in English
suit

Since the question whether the court will dissolve a marriage is one that 'touches fundamental English conceptions of morality, religion and public policy',³ and one that is governed exclusively by rules and conditions imposed by the English legislature,⁴ it seems clear that English law is applied as being the *lex fori*, not the *lex domicilii*.⁵ The question which of these laws is applicable becomes acute where the court possesses jurisdiction on some ground other than domicile.

English law
applies as
being the
lex fori

Suppose, for instance, that an Italian national, domiciled in England, after marrying an Englishwoman, is deported from the country and thereupon reverts to his Italian domicile.

In these circumstances the Matrimonial Causes Act, 1937,⁶ gave the English court jurisdiction in divorce, but it did not impose a rule for the choice of law. The circumstances arose in *Zanelli v. Zanelli*⁷ and the court, applying English domestic law granted the wife a decree, despite the rule of the Italian law of her domicile that divorce is not permissible. This particular type of case and also the case where the court has jurisdiction if the wife, though domiciled abroad, has resided in England for

¹ *Rayment v. Rayment*, [1910] P. 271, 286.

² *Jacobs v. Jacobs and Ceen*, [1950] P. 146.

³ Wolff, p. 374.

⁴ Dicey, p. 237.

⁵ But see Graveson, *The Conflict of Laws* (3rd ed.), pp. 390-2; also his articles in 28 *B.Y.B.I.L.* 278-9, and 37 *Transactions of the Grotius Society*, 168.

⁶ S. 13; now contained in Matrimonial Causes Act, 1950, S. 18 (1) (a), *supra*, p. 343.

⁷ (1948), 64 T.L.R. 556.

the last three years¹ no longer raise the problem, for the Act of 1950 specifically provides that 'the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings'.² In a suit for divorce, this means that English law must be applied without exception, though, as we have seen, this is not necessarily so in a suit for nullity.³

Divorce jurisdiction of foreign court depends solely upon domicil (b) *Jurisdiction of foreign courts.* The fundamental doctrine at common law, that remained undisturbed until *Travers v. Holley* in 1953,⁴ is that just as the English courts refuse to entertain a suit for dissolution of marriage unless the parties are domiciled in England, so do they deny that anything short of domicil enables a foreign court to pronounce a decree that will be recognized in England.⁵ Domicil is sufficient, even though the marriage was celebrated in England between British subjects;⁶ nothing less than domicil is sufficient, even though the parties are foreigners who were married abroad. Neither residence, nor nationality, nor the submission of the respondent to the proceedings⁷ suffices to render a court competent. A decree of divorce granted by a court of any country which is not the bona fide and true domicil of the parties is valueless in England (unless indeed its effectiveness is recognized by the *lex domicilii*),⁸ and if relied upon here as a justification for a second marriage may lead to a prosecution for bigamy.⁹

All decrees recognized by lex domicilii also recognized in England The law of the domicil in this connexion means the system of law that would be regarded as applicable by the courts of the

¹ Matrimonial Causes Act, 1950, S. 18 (1) (b); *supra*, p. 347.

² *Ibid.*, S. 18 (3).

³ *Supra*, p. 358.

⁴ *Infra*, p. 377.

⁵ *Harvey v. Farnie* (1880), 5 P.D. 153; (1882), 8 App. Cas. 43; *Bater v. Bater*, [1906] P. 209; *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; *Lanckester v. Lanckester*, [1925] P. 114.

⁶ *Harvey v. Farnie*, *supra*. In *Lolley's Case* (1812), 2 Cl. & F. 567 (N), it was said that no sentence of a foreign court could dissolve an English marriage for grounds on which it was not dissoluble by English law. This statement, however, must be confined to the facts, which were that the Scottish courts had granted a divorce to parties who were not domiciled in Scotland. See *Shaw v. Gould* (1868), L.R. 3 H.L. 55; *Niboyet v. Niboyet* (1878), L.R. 4 P.D. 1, at pp. 15-16, *per* Brett L.J.; *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641, at p. 657, *per* Lord Haldane. The decision is too old to be of value. In 1812 the English courts could not grant a decree of divorce, and the modern principle that domicil is omnipotent in matters of personal status was not fully developed.

⁷ *Papadopoulos v. Papadopoulos*, [1930] P. 55; *infra*, p. 386; *Armitage v. A.-G.*, [1906] P. 135, 140.

⁸ *Armitage v. A.-G.*, *supra*, discussed *infra*, p. 375.

⁹ *Green v. Green*, [1893] P. 89; *Trial of Earl Russell*, [1901] A.C. 446.

domicil.¹ This is one of the few cases in which the doctrine of *renvoi* finds a place in English law. A decree of divorce obtained in a country foreign to the domicile, upon a ground that would be insufficient by the internal law of the domicile but which is recognized as valid by the private international law of the domicile, is effectual in England. Or, to put it in another way, if the court of the domicile recognizes the jurisdiction of a court in another country, a decree given by the latter is valid in England.² The question arose in *Armitage v. A.-G.*³

The English wife of an American citizen domiciled in New York, after residing for 90 days in South Dakota, obtained a decree of divorce from the court of that State on the ground of her husband's desertion. Divorce could not have been obtained in New York for desertion, but it was proved in evidence that the law of New York would recognize the validity of a decree granted in another State in such circumstances as the above.

Sir Gorell Barnes held that the decree was equally binding in England. All questions of status are subject to the *lex domicilii*, and here was a decree, recognized by that *lex*, which patently affected the status of husband and wife.

An exception to the rule that divorce jurisdiction is confined to the courts of the domicile has been created by the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, as amended by the Colonial and Other Territories Divorce Jurisdiction Act, 1950.

Recognition of certain divorces granted in country of residence

The Acts of 1926 and 1940 provide that the Indian High Court shall have divorce jurisdiction in respect of British subjects domiciled in England or Scotland if the petitioner was resident in India at the time of presenting the petition and if the place where the parties last resided together was in India.⁴ The grounds on which divorce may be granted are limited to those recognized by the existing law of England.⁵

The Acts next provide that any such divorce shall be registrable in the country of the domicile of the parties and that after registration proceedings may be taken thereunder as if the

¹ *Armitage v. A.-G.*, [1906] P. 135, criticized by J. H. C. Morris, 24 *Canadian Bar Review*, 73; replied to 25 *Canadian Bar Review*, 226 et seqq. (Raphael Tuck).

² *Perin v. Perin*, [1950] S.L.T. 51; *McKay v. Wallis*, [1951] S.L.T. (Notes of Recent Decisions) 6 (Scotland).

³ [1906] P. 135.

⁴ Indian and Colonial Divorce Jurisdiction Act, 1926, s. 1 (1), as amended by Indian and Colonial Divorce Jurisdiction Act, 1940, s. 2 (1).

⁵ Act of 1926, s. 1 (1) (a) as amended by Act of 1940, s. 1 (1).

decree had been made by the High Court in England or the Court of Session in Scotland.¹

It is also enacted that these statutory provisions may be extended by Order in Council to any part of His Majesty's dominions, other than self-governing dominions,² and that such order may determine the court by which the divorce jurisdiction is to be exercised.³ Between 1928 and 1937 the provisions were extended to Kenya,⁴ Singapore and the Malayan Union,⁵ Jamaica,⁶ Ceylon,⁷ Hong Kong,⁸ and Burma.⁹ The Acts ceased to apply to India, Pakistan, Burma, and Ceylon when these countries gained their independence, but the other extensions remain effective.

The Acts have been further strengthened in two respects by the legislation of 1950.¹⁰

First, they have been made applicable to persons domiciled in Northern Ireland.¹¹

Secondly, Orders in Council may now be made extending the provisions to protectorates, trust territories¹² and protected States,¹³ expressions which are to have the meanings assigned to them by the British Nationality Act, 1948.

Decrees
not based
on domicil
excep-
tionally
recognized

The common law doctrine, which repudiates any foreign decree of divorce not based jurisdictionally upon domicil, was established at a time when domicil was the only ground upon which the English court itself assumed jurisdiction. Since 1937, however, the domestic jurisdiction has been widened in the case of petitions by a wife and may now be founded upon her prior but no longer existing English domicil,¹⁴ or upon her residence in England during the last three years.¹⁵ The question, therefore, is whether the common law doctrine ought not to be modified so as to permit recognition of a foreign decree based jurisdictionally upon some non-domi-

¹ Act of 1926, s. 1 (3) as amended by Act of 1940, s. 4 (2).

² i.e. they may not be extended to Canada, Australia, New Zealand, South Africa, Eire, Newfoundland, and Southern Rhodesia.

³ Act of 1926, s. 2.

⁴ S.R. & O. 1928, No. 635.

⁵ S.R. & O. 1931, Nos. 851, 1103.

⁶ S.R. & O. 1932, Nos. 475, 646.

⁷ S.R. & O. 1936, No. 562.

⁸ S.R. & O. 1935, No. 836.

⁹ S.R. & O. 1937, No. 230.

¹⁰ 4 *I.L.Q.R.*, pp. 247-9.

¹¹ Colonial and Other Territories (Divorce Jurisdiction) Act, 1950, s. 1.

¹² *Ibid.*, s. 2 (1).

¹³ *Ibid.*, s. 3.

¹⁴ Matrimonial Causes Act, 1937, S. 13, now contained in the Act of 1950, S. 18 (1) (a); *supra*, p. 343.

¹⁵ *Ibid.*, S. 18 (1) (b); *supra*, p. 347.

ciliary ground, provided that the ground is substantially similar to that upon which English jurisdiction may be founded. If limping marriages are to be avoided, i.e. marriages regarded as valid in one country but void in another, and if the uniformity of private international law is to be advanced, there is much to commend the suggested principle of reciprocal recognition. It has in fact been applied by the Court of Appeal in *Travers v. Holley*¹ on the following facts:

A husband and wife, domiciled in England, emigrated to Australia and, as the majority of the court found, acquired a domicile in New South Wales. The husband, however, had abandoned this domicile and had returned to England at the time when his wife obtained a divorce in New South Wales on the ground of his desertion. The New South Wales court had assumed jurisdiction under a local statute couched in the same terms as section 13 of the English Matrimonial Causes Act.²

The Court of Appeal held that this decree, though not given by the court of the common domicile of the parties at the time of the proceedings, must be recognized as valid. In the words of Hodson L.J.:

'It must surely be, that what entitles an English court to assume jurisdiction must be equally effective in the case of a foreign court.'³

This decision was applied in *Carr v. Carr*,⁴ but was distinguished by Davies J. in *Dunne v. Saban*,⁵ where the facts were these:

A domiciled Englishman married his wife in England and sixteen months later emigrated to Florida where he acquired a domicile of choice. He subsequently returned to England alone and reverted to his English domicile. A year later, the court in Florida, basing its jurisdiction on the separate domicile that the wife had acquired according to the *lex fori* in that State and also on her actual bona fide residence there for more than 90 days, granted her a decree of divorce. In fact she had resided there for two years and five months.

Davies J. held that the Florida court lacked jurisdiction in the eyes of English private international law. In the first place, the wife was incapable of acquiring a separate domicile; secondly, the principle of reciprocity laid down in *Travers v. Holley*

¹ [1953] P. 246.

² Now contained in Matrimonial Causes Act, 1950, S. 18(1)(a); *supra*, p. 343.

³ [1953] P., at p. 256.

⁴ [1955] 1 W.L.R. 422 (a Northern Irish decree given under a statute similar to S. 18(1)(a) of the English Act of 1950).

⁵ [1955] P. 178.

ought not to be applied unless the 'extraordinary', i.e. the non-domiciliary, jurisdiction of the foreign court 'corresponds almost exactly with the extraordinary jurisdiction of' the English court.¹ Ninety days was a very different thing from the three years required by the corresponding English statute.

The reluctance of the learned judge to consider the full implications of the decision in *Travers v. Holley* was no doubt due to his conclusion that everything said in that case about reciprocal recognition was merely *obiter*. His reasoning was that since the Court of Appeal in that case had found the parties to be domiciled in New South Wales, the Court of that State had jurisdiction under the common law doctrine and that therefore the necessity to consider reciprocity did not arise.² With great respect, however, it must be said that this was a wrong interpretation of what the Court of Appeal found with regard to domicile. The common law doctrine requires the domicile of the parties to be in the forum at the time of the commencement of the proceedings; what the Court of Appeal found was that the common domicile, though in New South Wales at the time of the husband's desertion, was in England at the time of the proceedings.³

If reciprocal recognition is to have any value, a further point is whether a court, in estimating the substantial similarity of the English and foreign jurisdictional rules, should not consider the actual facts of the case.⁴ Ninety days is no doubt a far different period from that of three years, but can the same be said of the two years five months that the petitioner had resided in Florida?⁵

Validity of
divorce
exclusively
governed
by *lex*
domicilii

Not only does English law recognize a decree of divorce granted by the courts of the foreign domicile of the parties, but it also recognizes that, even in the case of a marriage contracted in England between British subjects, the decree is governed exclusively by the law of that domicile.⁶ Thus the validity of a divorce obtained in the country of domicile is not affected by the fact that it was granted for some cause, such as insulting

¹ [1955] P. 188.

² *Ibid.*, at p. 186.

³ See particularly 4 *I. & C.L.Q.R.* 389 (Gilbert D. Kennedy).

⁴ *Ibid.*, at pp. 392-3.

⁵ The literature on this subject of reciprocity is already considerable; see 3 *I. & C.L.Q.R.*, 152; 4, p. 389; 5, p. 126; 17 *M.L.R.* 509; 18, p. 177; 71 *L.Q.R.* 191.

⁶ *Harvey v. Farnie* (1882), 8 App. Cas. 43; *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Bater v. Bater*, [1906] P. 209.

behaviour¹ or violent and ungovernable temper,² which is inadequate by English law. Speaking of this principle in *Bater v. Bater*,³ Sir Gorell Barnes said:

'It is based upon the simple proposition that if this country recognizes the right of a foreign tribunal to dissolve a marriage of two persons who were at the time domiciled in that foreign country, it must also recognize that their marriage may be dissolved according to the law of that foreign country, even though that law would dissolve a marriage for a lesser cause than would dissolve it in this country. Absurd results would follow if that were not so, because by the law of the domicile they would cease to be husband and wife, and yet if they returned to this country they would be husband and wife. That is not convenient, nor is it logic, and I think if they were bona fide and properly domiciled in the country where it takes place it is a good divorce.'

Since the parties are no longer husband and wife, it follows that an English court cannot make a maintenance order against the former husband.⁴

The next question is whether the method by which a foreign divorce has been obtained is material to its recognition by English law. Is it, for instance, to be disregarded if it has not been granted by a court of law? This is an important problem, for the doctrine familiar to English law that divorce requires a judicial process is not universally accepted.

Is an extra-judicial foreign divorce recognised?

For instance, in China, a written statement in the proper form by which two spouses agree to divorce each other operates *ipso facto* as a dissolution of their marriage, though it may be registered if the parties so desire.

In Japan a divorce is obtainable as of right by mutual consent, the only formality being that the consent should be notified to a registrar.

A similar system prevailed in Russia prior to 1944.⁵

¹ *Metzger v. Metzger*, [1937] P. 19.

² *Pemberton v. Hughes*, *supra*.

³ [1906] P. 209, at p. 217.

⁴ *Metzger v. Metzger*, *supra*.

⁵ Under the Soviet law of 1918 a marriage was dissoluble by mutual consent, the only requirement being that an official should register the divorce. Failing mutual consent, one party was entitled as of right to a divorce from the court, provided only that proper notice had been given to the other party.

Under the Soviet code of 1926, divorce, as well as marriage, was a question of fact. Persons who lived together as man and wife were married in fact and in law; if they separated, either by mutual consent or at the will of one, they were divorced. The registration that was necessary did not effect divorce but merely provided conclusive evidence of the discontinuance of the marriage.

The Prohibition of Abortions Act, 1936, passed 'with a view to combating a frivolous attitude towards the family', required the parties to appear in person before the registrar. The pendulum swung back somewhat violently on 8 July 1944, when a decree modifying the marriage laws was promulgated. Article 23 of

Is such a divorce valid in England? It is submitted that a divorce obtained in, or according to the law of, a foreign domicil, even though obtained without contentious proceedings and even though it dissolves a marriage solemnized in England between British subjects, must be recognized by the courts of England, since it satisfies the general principle that alterations of status are governed by the *lex domicilii*. A fundamental principle, once it has deliberately been adopted, should be applied fearlessly, and, in the absence of some peremptory consideration of public policy, should not be frittered away by exceptions merely because the views of the *lex domicilii* on the institution of marriage are less stringent than those held in England. Public policy can scarcely be invoked in the present connexion. Marriage is a universal institution. It creates a status that according to English principles is governed by the law of the domicil. It is that law which decides *inter alia* whether the status shall cease, and it is difficult to agree that its termination by some process adequate according to the personal law should be disregarded merely because it has been effected in a manner alien to English conceptions and practice. English law does not disregard a form of legitimation allowed in the domicil merely because it is not a possible form in England. If the *cause* for divorce is immaterial to its recognition in England, as the authorities indubitably establish, why should its *method*, judicial or extra-judicial, be material? The question is not—By what procedure has the marriage been dissolved? It is—Has the marriage been dissolved according to the law of the domicil? The *lex domicilii* must either be accepted *in toto* or altogether repudiated. There is no half-way house.¹

The *Hammer-smith Marriage Case* *The Hammersmith Marriage Case*² requires consideration in the light of these remarks.

A Mohammedan, domiciled in India, married a domiciled English-woman in England with English formalities. He later sent her a written declaration of divorcement, called *talaknama*, by which he purported to dissolve the marriage. By Mohammedan law a Mohammedan may have

this provides that divorce must take place in the public courts. Notice of a desire to dissolve the marriage must first be presented to the People's Court, before which both parties must appear (Art. 24). This court must attempt to reconcile the parties, but if it fails the claimant is entitled to apply for dissolution to a higher court (Art. 25). For a full account of the present Russian practice see 11 *M.L.R.* 163 et seqq.

¹ See Wolff, s. 347.

² *R. v. Hammersmith Superintendent Registrar of Marriages, Ex parte Mir-Anwaruddin*, [1917] 1 K.B. 634.

four wives at the same time, and may dissolve any of his marriages by a mere declaration of his will and without seeking the intervention of a court of law. Indeed, access to a court is denied to him, for the Indian courts have no jurisdiction to dissolve his marriage, and his Indian domicile prevents him from resorting to the English courts.

The question before the King's Bench Division, and later before the Court of Appeal, was whether the *talaknama* was effective in England to dissolve the marriage. The six judges unanimously held that it was not. This repudiation of the *lex domicilii* would appear to have been based on two main reasons.

The first was that English law will not recognize a foreign divorce unless it has been decreed by a court of law. (i) No judicial decree

Lord Reading, for instance, said that neither authority nor principle could be found for the proposition that a marriage contracted in England could be dissolved in the eyes of English law by mere operation of the religious law of the husband and without a decree of a court of law.¹

Swinfen Eady L.J., adopting the opinion of Lord Brougham, stigmatized as absurd the suggestion that 'if there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing *in pais* to separate, every other country ought to sanction a separation had *in pais* there, and uphold a second marriage contracted after such a separation'.²

It is submitted that the proposition, so disparagingly rejected, is perfectly sound in principle. The *lex domicilii* applicable to the husband was the law of his religion, and whether that law required a judicial decree or not was no concern of the English court. The insistence upon a judicial proceeding scarcely harmonizes with the attitude consistently adopted by the Privy Council towards Jewish divorces. In Egypt and in certain countries in the Levant, Jews are subject to the law of their religion upon matters of personal status such as marriage and divorce. Jewish Rabbinical law permits a husband to divorce his wife by the delivery of a *gett* (i.e. a letter of divorce), and, though this requires his appearance before a Rabbi, the proceeding is formal and in no way dependent upon a judicial pronouncement. The question whether a *gett* delivered in the domicile of the parties is to be recognized as valid in England was considered by the Privy Council in *Sasson v. Sasson*.³ In

¹ At pp. 642-3.

² *Warrender v. Warrender* (1835), 2 Cl. & F. 488, at p. 532.

³ [1924] 1 A.C. 1007.

that case two British subjects of the Jewish religion, domiciled in Egypt, had been divorced by the Grand Rabbinate at Alexandria, presumably after the delivery of a *gett*. The husband had applied to the British Consular Court in Egypt for a declaration that this divorce had dissolved his marriage, and the Privy Council held, on appeal, that the application must be granted, since the Ottoman Order in Council, 1910, had provided that in all matters affecting marriage the Consular Court should, in the case of persons belonging to non-Christian communities, apply their religious law and custom. The following words may be cited from the judgment of the Privy Council:

'The court had no jurisdiction itself to dissolve a marriage. It had, however, jurisdiction to declare rights and, in matters relating to marriage . . . it was bound in the case of persons not belonging to Christian communities to recognize and apply the religious law and custom of the persons concerned. . . . Now, the court of the domicile here could not grant divorce, but on the other hand it was bound by the words above cited to acknowledge the validity of a divorce good according to the religious law of the non-Christian subject. The situation seems identical with that which has often arisen in India. Divorce by means of the use of the phrase known as *talak* is not a ground which would be good by English law. None the less, the British courts have often given effect to Mohammedan divorces.'

This decision is valuable, for, though given on appeal from a court in Egypt and concerned with the interpretation of an Order in Council,¹ it shows that it is not the policy of English law to disregard a divorce binding in the domicile merely because it has been granted without judicial investigation.

Moreover, it may be asked why such stress should be laid on the fact of judicial proceedings. Judicial intervention has no inherent virtue, neither is it universal. The only method by which a marriage can be dissolved at the present day in Quebec is an Act of Parliament, and it is inconceivable that a divorce obtained in this province should be disregarded in England.

(ii) Method unsuitable for monogamous marriage

The second reason for disregarding the *lex domicilii* in the *Hammer-smith Case* was that the marriage was not a marriage in the Mohammedan sense at all and therefore that it could not be dissolved in the Mohammedan manner.²

This is a more intelligible reason. Since the traditional view is that the *lex loci celebrationis* determines the character of a

¹ *Bell Yard* (Nov. 1935), 10-11.

² *Ibid.*, at p. 659.

marriage,¹ the parties were monogamously married and it is clear therefore that the court could no more recognize a divorce by a non-monogamous method than it could permit the husband to contract further valid marriages in England. A Christian marriage cannot be dissolved by a Mohammedan divorce, a fact with which presumably Moslem law would agree. There appear to be two views that Mohammedan law might take of the English ceremony. It might regard the marriage as a nullity, in which case an English court ought on principle to accept this conclusion of the *lex domicilii*. Or it might regard the marriage as good in the Christian, though not in the Mohammedan, sense, and therefore not open to a Mohammedan method of divorce. On this latter hypothesis the decision is reconcilable with the principle that the *lex domicilii* must be followed upon questions of status. A Japanese divorce stands upon an entirely different footing, for, though it is obtainable without judicial intervention, it is designed for monogamous marriages. In view of the litigation about to be considered, it may now be taken that the decision in the *Hammersmith Marriage Case* must rest only on the second ground assigned by the court.²

It is now settled by the *Har-Shefi*³ litigation, however, that an extra-judicial divorce, obtained in accordance with the religious law of the common domicil of the parties, must be recognized as valid. This litigation was provoked by the following facts:

In 1950, a marriage was contracted in Israel between two members of the Jewish faith. The husband was continuously domiciled in Israel, the wife was domiciled in England before the marriage. After a short residence together in England during 1951, the husband was deported from the country, but his wife did not accompany him. Before his departure, he delivered a *gett* which was received by his wife at the Beth Din in London, the court of the Chief Rabbi.

In *Har-Shefi v. Har-Shefi* (No. 1)⁴ the wife petitioned for a declaration that her marriage had been validly dissolved as from the date of receipt of the *gett*. The Court of Appeal held in the first place that the Divorce Court possesses jurisdiction to

¹ *Supra*, pp. 299 et seqq.

² See also *Maher v. Maher*, [1951] 2 All E.R. 37; *Bialik v. Bialik*, 3 I.L.Q.R. 365, where by a Palestinian decision given in terms of English law a divorce by mutual consent of members of the Jewish faith domiciled in Palestine was held to be valid.

³ *Har-Shefi v. Har-Shefi* (No. 1), [1953] P. 161; (No. 2), [1953] P. 220.

⁴ *Supra*.

pronounce such a declaratory judgment, even though no other matrimonial relief is sought. This jurisdiction, however, is exercisable only if the petitioner is domiciled in England. The second question in the instant case, therefore, was whether Mrs. Har-Shefi had reverted to her English domicil of origin. This depended upon the legal effectiveness of the delivery of the *gett*, and this in turn depended upon whether Israeli law, the law of her domicil throughout the marriage, would recognize that a valid divorce had been effected. The Divorce Court must therefore hear evidence on this matter and decide for itself whether the divorce was valid by that law or not.

Acting upon that ruling, the wife, in *Har-Shefi v. Har-Shefi* (No. 2),¹ petitioned the Divorce Court for a declaration that her marriage had been dissolved. Pearce J. was satisfied by the expert evidence that Israeli law would treat the delivery of the *gett* as a valid divorce. Accordingly, citing *Sasson v. Sasson*² as persuasive authority, he held that the marriage had been 'validly dissolved by the only form of divorce open to a Jew domiciled in Israel'³ and made a declaration to that effect. Had the parties been domiciled in England the delivery of the *gett* would have had no effect upon the status of the parties.⁴

The salient features of this litigation were that no judicial process had been put in motion in the Israeli domicil and that what was held to constitute a divorce was an act performed wholly in England. The decisions in fact exemplify a shift of emphasis from jurisdiction to choice of law. The question upon which the issue was made to turn was not whether a valid divorce had been obtained in the country of the domicil, but whether it had been obtained according to the law of the domicil.⁵

Effect of
prohibi-
tions
against re-
marriage

A decree of divorce granted by the court of the domicil, since it regulates the status of the parties, constitutes a judgment *in rem* that is binding throughout the world,⁶ provided that it satisfies the requirements of finality and conclusiveness that are necessary to make foreign judgments effective in England. We shall see later that a foreign judgment is not actionable in England unless it finally and conclusively determines the issue between the parties.⁷ The question whether a

¹ [1953] P. 220.

² *Supra*, pp. 381-2.

³ At pp. 223-4.

⁴ *Preger v. Preger* (1926), 42 T.L.R. 281; *Joseph v. Joseph* [1953] 1 W.L.R. 1182.

⁵ 17 M.L.R. 501 (R. H. Graveson).

⁶ *Bater v. Bater*, [1906] P. 209.

⁷ *Infra*, p. 626.

decree of divorce is of this nature may arise where the decree, though purporting to dissolve the marriage, has restrained one or both of the parties from remarriage. Restrictions of this kind are common in the legal systems of the modern world, and they appear to fall roughly into two classes, namely, those which are directed against the guilty party and those which postpone the date at which either party may contract a further marriage.

To take the latter class first, it may be said that a decree (i) Re-marriage of either party within specified period which forbids the parties to remarry before a certain period has elapsed has not finally and conclusively restored the parties to the status of celibacy. It is somewhat analogous to the order *nisi* that is conspicuous in the English practice. The dissolution of the marriage occurs upon the lapse of the specified period, not at the issue of the decree. This view was adopted for English law in *Warter v. Warter*,¹ where the parties, who had been divorced in Calcutta, were prohibited by the Indian law of their domicile from marrying again before six months. It was held that a marriage contracted by the wife within six months with a domiciled Englishman was invalid.

On the other hand, a decree which finally dissolves the marriage, but which, by way presumably of punishment, imposes a restriction on the guilty party, is regarded by English law as imposing a penalty. We have already seen that the penal laws of foreign countries may be disregarded in England.² Thus in *Scott v. A.-G.*:³

Two persons domiciled in South Africa were divorced in that country, and thereupon became subject to a rule of South African law which provided that the guilty party could not remarry as long as the other party remained unmarried. The wife, who was the guilty party, remarried in England, her former husband being still unmarried.

This second marriage was upheld by the English court on the ground that the restriction on remarriage was a penalty, and therefore inoperative out of the jurisdiction under which it was inflicted. The correctness of this decision would seem, indeed, to rest on an even simpler reason. Since the decree had effected a complete dissolution of the marriage according to South African law, the woman, being no longer a wife, was free to acquire her own separate domicile. She had in fact acquired a

¹ (1890), 15 P.D. 152; but see now *Buckle v. Buckle*, [1956] P. 181. *Boettcher v. Boettcher*, [1949] W.N. 83; 93 Sol. J. 237. See the Australian case, *Miller v. Teal* (1955), 29 A.L.J. 91; discussed 5 *I. & C.L.Q.R.* 137-41.

² *Supra*, pp. 135 et seqq.

³ (1886), 11 P.D. 128.

new domicile in England at the time of her remarriage, and therefore there was no possible ground upon which her capacity to marry could be referred to South African law.¹

A foreign decree of divorce, if void, is void in toto A foreign decree of divorce or of nullity that is ineffective because made by a court lacking jurisdiction is ineffective in all its aspects. Not only is the decree *in rem*, dissolving or annulling the marriage, disregarded in England, but also any consequential decree *in personam*, such as an order for alimony.² In the words of Goddard L.J.:

'If the main order goes, then any order which is merely ancillary to that order should go with it.'³

This was one of the points decided in the somewhat complicated case of *Papadopoulos v. Papadopoulos*,⁴ where the facts were as follows:

A domiciled Cypriot, belonging to the Greek Orthodox Church, married a Frenchwoman at a registry office in London, according to the English formalities. Some eight years later a Cypriot court annulled the marriage by consent of the parties on the ground that it had not been celebrated in a church or by a priest of the Greek Orthodox religion as is required by the law of Cyprus in the case of a party professing that faith. The court also decreed that the husband should pay the wife a lump sum of £380 in satisfaction of all claims including maintenance. The court, which was a British court established and regulated by an Order in Council, had in fact no jurisdiction either to annul or to dissolve a marriage. Fifteen years later the wife instituted summary proceedings against the husband in London, where he was then resident, and obtained an order for maintenance at the rate of £2 a week. The present case was an appeal from that order.

It was incontrovertible that the marriage in London was valid, since the English formalities had been observed. Nevertheless it was argued that the English order for the payment of maintenance was wrong in law, on the ground that the parties had lost the status of husband and wife by virtue of the Cypriot judgment, and also on the ground that the receipt by the wife of £380 under the Cypriot order nullified her claim to maintenance. In reply, the Cypriot judgment was said to be severable. The decree *in rem* annulling the marriage was ineffective, the decree *in personam* ordering a fixed payment in lieu of maintenance was conclusive. This reply had no substance.

¹ See Wolff, p. 379; 21 *Australian Law Journal*, 4.

² *Simons v. Simons*, [1939] 1 K.B. 490; *Papadopoulos v. Papadopoulos*, [1930] P. 55.

³ *Simons v. Simons*, *supra*, at p. 499.

⁴ *Supra*.

First, the Cypriot court, according to its constitution, could award neither maintenance nor a lump sum in lieu thereof unless it first made a decree of nullity, of divorce, of restitution of conjugal rights or of judicial separation. By its constitution it had no jurisdiction to annul or to dissolve the marriage, and it had not purported to make a decree either of restitution or of judicial separation. The Cypriot decree was void *in toto*.

Secondly, the want of jurisdiction to annul the marriage was not curable by the submission of the parties.

'Consent makes no difference; the husband and wife could not by consent give the court jurisdiction to declare that the woman was not a wife, or to make an order upon that footing.'

It was held, therefore, that the parties were still husband and wife and that the English order for maintenance could not be impugned.

G. SUITS FOR JUDICIAL SEPARATION

(a) *Jurisdiction of English courts.* Judicial separation, formerly called divorce *a mensa et thoro*, may by English law be granted at the instance of either party upon any grounds upon which a decree of divorce may be made,² or upon the ground of failure to comply with a decree for the restitution of conjugal rights or upon proof of desertion for two years. A petition for this relief, unlike a suit for divorce, does not make a permanent, or indeed any, change in the status of the parties. The object is to obtain protection from some of the consequences of that status and to suspend some of the mutual obligations of the parties; the effect of a decree is to leave the status of the parties unchanged.³ It therefore follows that there is no call to confine jurisdiction to the courts of the domicile. The very nature of the remedy sought makes the suit one which on grounds of policy ought to be justiciable, not only in the domicile of the parties, but also in the country where they are at the moment resident.⁴ Moreover, the course of legal history in England shows that, at any rate in this country, residence is a sufficient test of jurisdiction. Judicial separation is the modern successor of divorce *a mensa et thoro*, which could formerly not be decreed by an ecclesiastical court unless the parties were present within the diocese at the time of the suit; and, as we have already seen, the Matrimonial

¹ *Per Hill J.*, at p. 69.

² *Supra*, p. 365, note 4.

³ *Armstrong v. Armstrong*, [1898] P. 178.

⁴ *Le Mesurier v. Le Mesurier*, [1895] A.C. 517, 526-7.

Causes Act, 1857, provided that the civil tribunal set up to deal with such matters should act on principles as nearly as possible conformable to those on which the ecclesiastical courts had formerly acted.

Jurisdiction based on residence of respondent On these grounds it is firmly established that the mere residence of the parties in England at the time of the suit gives an English court jurisdiction to entertain a suit for judicial separation.¹ Despite certain statements to the contrary,² it is not necessary that the matrimonial residence, in the sense of the family establishment, should be in England.³ It is sufficient if both parties are resident, in the sense of being present, in the country. The fact that the petitioner resides in England is not in itself enough,⁴ but if the respondent is in fact present in the country, living for instance in hotels and boarding houses,⁵ the court has jurisdiction, even though the residence of the petitioner may be in some other country.⁶ It has even been held that the possession by the respondent of a house within the jurisdiction, to which he is always entitled to go, constitutes residence.⁷ It is not necessary that the conduct upon which the suit is brought should have occurred in England.⁸

Residence of petitioner alone in some cases sufficient There are unfortunately certain cases in which residence of a more nebulous character than that indicated above has been held sufficient to found jurisdiction.

In *Riera v. Riera*,⁹ for instance, a suit was brought against a Spanish husband, who had lived in adultery in Germany for the last five years, and who was still so living there at the time of the proceedings. The respondent entered an appearance under protest, and it was held, presumably on the ground of submission, that he was amenable to the jurisdiction.

Again, in *Ward v. Ward*,¹⁰ the respondent, a domiciled Englishman, was an officer in the Indian Army, and consequently, though his real matrimonial home might be described as English, he was temporarily resident in India. Jurisdiction certainly existed by reason of the English domicil, as we shall see in the next paragraph, but apart from this consideration, the court held that the respondent had a sufficient matrimonial residence in this country, since his residence in India was without his volition and was determined by his superior officers.

¹ *Armstrong v. Armstrong*, [1898] P. 178; *Anghinelli v. Anghinelli*, [1918] P. 247; *Graham v. Graham*, [1923] P. 31.

² e.g. *Foot v. Foot*, p. 158.

³ *Armstrong v. Armstrong*, *supra*, at p. 189.

⁴ *Graham v. Graham*, *supra*.

⁵ *Matalon v. Matalon*, [1952] P. 233.

⁶ *Sim v. Sim*, [1944] P. 87.

⁷ *Racburn v. Racburn* (1928), 44 T.L.R. 384.

⁸ *Armstrong v. Armstrong*, *supra*, at p. 194.

⁹ (1914), 112 L.T. 223.

¹⁰ (1923), 39 T.L.R. 440; see also *Racburn v. Racburn* (1928), 44 T.L.R. 384.

Residence, however, is not the only factor. Domicil without residence is equally effective, for to make the matter turn solely upon residence would be inconsistent with the general principle that the personal rights and relations of parties are properly determinable by the courts of their domicil.¹

Jurisdiction based on domicil

The modern rule is, therefore, that either domicil alone or residence alone in England renders English courts competent to decree judicial separation. Jurisdiction also now exists if the circumstances fall within section 18 (1) (a) of the Matrimonial Causes Act, 1950.²

It would seem that all questions connected with a petition for judicial separation, as, for example, whether a decree shall be made and if so upon what conditions, are governed by English law and not by the *lex domicilii* to which ordinarily all matters of status are referred. The justification of this practice, which at first sight may seem contrary to principle, is the close connexion of judicial separation with the requirements of internal order and social decency. During the residence of the parties in England they are each entitled to the degree of protection that is considered necessary by English law.

Choice of law

(b) *Jurisdiction of foreign courts.* There would appear to be no English cases in which the effectiveness in England of a foreign decree of judicial separation has been considered. It is reasonably clear, however, that, as in the case of divorce, the principles upon which the English courts assume jurisdiction must be reciprocally applied. Upon this footing, the court of a foreign country will be regarded as possessing the necessary jurisdiction if the parties are either domiciled or resident in that country at the time of the suit.

Foreign jurisdiction sufficiently founded by residence of domicil

D. SUITS FOR RESTITUTION OF CONJUGAL RIGHTS AND JACTITATION OF MARRIAGE

The principles applicable to a suit for restitution of conjugal rights, which may be brought if either party deserts the other without reasonable cause, are the same as those that govern a suit for judicial separation.³ Jurisdiction is sufficiently founded either by residence alone⁴ or by domicil alone.⁵ On the other

Restitution

¹ *Eustace v. Eustace*, [1924] P. 45.

² *Supra*, p. 343.

³ *Supra*, pp. 387-9.

⁴ *Thornton v. Thornton* (1886), 11 P.D. 176.

⁵ *Dicks v. Dicks*, [1899] P. 275; *Bateman v. Bateman*, [1901] P. 136; *Perrin v. Perrin*, [1914] P. 135.

hand, the court refuses to entertain the suit if the respondent is neither domiciled nor resident in England.¹

**Jactitation
of marriage** A suit for jactitation of marriage, a rare proceeding, may be brought against a person who persistently and falsely boasts that he or she is married to the petitioner.² The relief granted is a decree of perpetual silence. It seems clear that the jurisdiction of the court to grant this relief is sufficiently founded upon the residence of the respondent in England.³

¹ *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574; *Firebrace v. Firebrace* (1878), 4 P.D. 63; *De Gasquet James v. Duke of Mecklenburg-Schwerin*, [1914] P. 53.

² *Thompson v. Rourke*, [1893] P. 70; *Goldstone v. Goldstone* (1922), 127 L.T. 32; *Igra v. Igra*, [1951] P. 404.

³ Westlake, p. 94; *Schuck v. Schuck* (1950), 66 T.L.R. (Pt. 1), 1179.

CHAPTER XII

LEGITIMACY AND LEGITIMATION

I. Legitimacy. *Pages 392-403.*

II. Legitimation. *Pages 403-17.*

A. The law that determines whether legitimation is effective. *Pages 403-12.*

1. Legitimation *per subsequens matrimonium*. *Pages 404-7.*

2. Legitimation by recognition. *Pages 407-10.*

3. Adoption. *Pages 410-12.*

B. The effect in England of a foreign legitimation. *Pages 413-17.*

THE two matters that require consideration in this chapter are legitimacy and legitimation. Legitimacy ordinarily means the status acquired by a person who is born in lawful wedlock. Legitimation means that a person who has not been born in lawful wedlock acquires the status of a legitimate person as the result of some act, such as the subsequent marriage of his parents, that occurs after the date of his birth.

Meaning of 'legitimacy' and 'legitimation'

Whether a person is legitimate or not is of the first importance, for if the will of a domiciled Englishman contains a gift to the 'children' of a specified person, the established rule of English law is that the gift means legitimate children only, unless

Importance of the subject

- (i) it is impossible in the circumstances that any legitimate children can take;¹ or
- (ii) it is clear from the words of the will that the testator intended to include illegitimate children.²

This rule applies to terms of relationship generally, such as 'sons' and 'daughters', 'grandchildren' and 'issue'.³ The same rule applies to a case of intestacy, so that, for instance, 'issue' claiming a share of the property under the Administration of Estates Act, 1925, must be legitimate.⁴ Again, legitimacy affects the domicile of origin of a child, the rights of guardian-

¹ *In re Wohlgenuth*, [1949] 1 Ch. 12.

² *Hill v. Crook* (1873), L.R. 6 H.L. 265, 282. *In re Herwin*, [1953] Ch. 701. The words 'child' or 'children' also include adopted children, Adoption Act, 1950, s. 13. *In re Gilpin*, [1954] Ch. 1

³ *Wilkinson v. Adam* (1812), 1 V. & B. 122; affirmed (1823), 12 Price, 470; Hawkins on Wills, p. 102.

⁴ *In re Goodman's Trusts* (1881), 17 Ch.D. 266, a decision under the old Statutes of Distribution,

ship possessed by his parents, and the question whether, if born abroad of a British father, he acquires British nationality.

The role of private international law in this matter is to specify what system of law shall decide whether a person is born legitimate or whether he has been legitimated.

I. LEGITIMACY¹

Legitimacy
not neces-
sarily con-
fined to
birth in
lawful
wedlock

It is clear that by English internal law the test of legitimacy is birth in lawful wedlock. The controversy in private international law, however, is whether this test must be satisfied in a case containing a foreign element. The question here is, not—By what general test is legitimacy to be determined?, but—Which system of internal law is to provide the test? The distinction is of vital importance, since there are many countries in which birth in lawful wedlock does not constitute the sole test of legitimacy.

For example, in many countries a system of putative marriage prevails, under which the children of a void marriage that has not yet been nullified are regarded as legitimate. A general, but not a universal, qualification is that the spouses should have bona fide believed in the validity of their marriage.² Conversely, other legal systems deny the status of legitimacy to children born in lawful wedlock if they were begotten before wedlock.

It is sometimes contended that birth in lawful wedlock is the test of legitimacy not only by the internal law, but also by the private international law, of England.

This repudiation of the tests adopted in other legal systems is a curious example of insularity. The question for private international law is whether a child is legitimate, not whether he has been born in lawful wedlock, and, having regard to the varying tests of legitimacy to be found throughout the world, there is no reason why the particular test of English law should be allowed in all cases to prevail. If the status of minority ceases at twenty-one, as it does in England, reason scarcely suggests that for the purposes of private international law majority must in all cases mean the attainment of that particular age. The proposition that legitimacy depends exclusively upon a valid marriage is susceptible of curious results. If, for example, the marriage of the parents was void, but putative,

¹ For a fuller understanding of this difficult subject reference should be made to an article by R. S. Welsh, 63 *L.Q.R.* 65, *Legitimacy in the Conflict of Laws*.

² See Wolff, p. 385.

according to the law of their domicil, an English court would accept the invalidity of the marriage but repudiate the legitimacy of the children.

In so far as the judges have considered the matter *in abstracto*, The test as stated by English judges it is reasonably clear that they have indicated the true principle upon which a disputed question of legitimacy should turn. In many *obiter dicta* they have appreciated that legitimacy is a matter of status, and that therefore it is determined by the law obtaining in the child's domicil of origin, i.e. by the law of his father's domicil at the time of his birth. There are many dicta to this effect expressed in decisions dealing with the cognate subject of legitimation. In the leading case of *Birrowhistle v. Vardill*,¹ Lord Chief Baron Alexander, in delivering the opinion of the judges to the House of Lords, used these words:

'It appears to us that whenever a question of the nature put to us by your Lordships² arises in an English Court of Justice, there are two points to which the attention of the judge must be directed. . . . The first in order regards the *status* or condition of the claimant. . . . As to the first of these questions I believe I express the opinions of the Judges when I say, in the well-considered language of Lord Stowell in *Dalrymple v. Dalrymple*,³ that, "The cause being entertained in an English court must be adjudicated according to the principles of English law applicable to such a case; but the only principle applicable to such a case by the law of England is, that the status or condition of the claimant must be tried by reference to the law of the country where the status originated; having furnished this principle the law of England withdraws altogether, and leaves the question of status in the case put to the law of Scotland." Such is the sentiment of that great Judge, and such is his language, varied only so far as to apply to a question of legitimacy what was said of a question respecting the validity of a marriage.'

Kindersley V.-C. spoke to the same effect twenty-two years later.

'It appears to me that on the authorities applicable to this question, the principle is this, that the legitimacy or illegitimacy of any individual is to be determined by the law of that country which is the country of his origin. If he is legitimate in his own country, then all other civilized countries, at least all Christian countries, recognize him as legitimate everywhere. Questions may arise, and have arisen, whether the law which is to determine the legitimacy or illegitimacy is the law of the country where the individual was born, or the law of the country where

¹ (1835), 2 Cl. & F. 571, 573-4.

² The question related to legitimation.

³ (1811), 2 Hag. Con. 54, 58-59.

the parents inter-married, or the law of the country of the domicile of the parents, and if the domicile of the parents was different, whether the law of the father's or the mother's domicile governs. If it were necessary for me to determine these questions I should hold that the law of the father's domicile governed.'¹

Cotton L.J. affirmed the principle in another case:

'It was urged . . . that the law of England recognizes as legitimate those children only who are born in wedlock. This is correct as regards the children of persons who at the time of the children's birth are domiciled in England. But the question of legitimacy is one of status, and in my opinion by the law of England questions of status depend on the law of the domicile.'²

Later in the same case he said:

'I am of opinion that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of England . . . recognizes and acts on the status thus declared by the law of the domicile.'³

In the case of *In re Andros*⁴ Kay J. said:

'It must now be treated as settled that any person legitimate according to the law of the domicile of his father at his birth is legitimate everywhere within the range of international law for the purpose of succeeding to personal property.'

Correct
test is
status of
child in
father's
domicil

Finally, in a case that concerned legitimacy, not legitimation, Romer J. not only said, but held that:

'Where succession to personal property depends on the legitimacy of the claimant, the status of legitimacy conferred on him by his domicile of origin (i.e. the domicile of his parents at his birth), will be recognized by our courts; and . . . if that legitimacy be established, the validity of his parents' marriage should not be entertained as a relevant subject for investigation.'⁵

In *Bamgbose v. Daniel*,⁶ the Privy Council approved these statements by Kindersley V.-C. and by Romer L.J. According to these judicial declarations, then, legitimacy is purely a matter of status and, in accordance with general principles, it follows that if the domicile of origin of children confers the status of legitimacy upon them, although it holds the marriage from

¹ *In re Don's Estate* (1857), 4 Drew, 194, 197-8.

² *In re Goodman's Trusts* (1881), 17 Ch.D. 266, 291.

³ *Ibid.*, at p. 292; see also pp. 296-7, *per* James L.J.

⁴ *In re Andros* (1883), 24 Ch.D. 637.

⁵ *In re Bischoffsheim*, [1948] Ch. 79, 92.

⁶ [1955] A.C. 107.

which they have sprung to be null and void (a situation that arises in those countries, such as Scotland and France, where the doctrine of putative marriage obtains),¹ that status ought to be recognized in England. An apt illustration of this principle is furnished by the Connecticut case of *Moore v. Saxton*.² In that case:

The question that fell to be decided by the court in Connecticut was whether certain children who had been born in California were to be regarded as legitimate in Connecticut from the moment of their birth. The parents, who were domiciled in California throughout, were bigamously married. The rule of Californian law is that the children of bigamous marriages are legitimate. By the law of Connecticut such children are illegitimate.

It was held that, since the Californian rule did not contravene any fundamental principle of morality or public policy adopted in Connecticut, the status of legitimacy, thus established by the law of the domicile of origin, must be recognized.

But is it correct to identify the domicile of origin with the domicile possessed by the father at the birth of the child? It may be objected that to allow the law of this domicile to determine legitimacy is to beg the question. A child is domiciled with the father if legitimate, but with the mother if illegitimate.³ Therefore, to assume that he is domiciled with his father has been stigmatized as 'involving a particularly vicious form of circular argument'.⁴ A practical answer to this is that since nobody can be without a domicile, some domicile must be attributed to a child at birth. If so, the reasonable solution is to presume his legitimacy and to regard him as domiciled, at least temporarily, with the father.⁵ If legitimacy is denied to him by the *lex domicilii* of the father, he will then follow the mother into whatsoever domicile she may acquire.

Predominance of father's domicile justified

The choice of the father's domicile may, perhaps, be supported on the more fundamental ground that, in the words of Wolff, 'legitimacy is concerned with the relationship between child and father'.⁶ This would seem to be correct. The controversy in the dispute is whether the child has been born in

Legitimacy connotes relationship between child and father

¹ Amos and Walton, *Introduction to French Law*, pp. 64-65.

² (1916), 90 Conn. 164; Lorenzen, p. 750.

³ *Supra*, p. 183.

⁴ Morris, p. 172.

⁵ 'The German Reichsgericht encounters this argument of a vicious circle (unduly popular in the law of conflicts) by the consideration that a child is to be regarded as legitimate so long as its position is not destroyed by judgment', Rabel, i. 605.

⁶ *Private International Law*, p. 382.

such circumstances that he has become a member of the father's family. If the answer is favourable, then certainly the child, and probably the mother also, will be absorbed into the environment of the father. What more appropriate law can be found to determine the issue than that which governs the man with whom relationship is claimed and upon whom the burdens of paternity may be imposed?

Effect of change of domicile after conception The decisive date for fixing the domicile of origin is the birth of the child. A child, no doubt, is deemed at birth to have been in existence from the time of conception,¹ and if the parents change their domicile between the time of conception and of birth it is arguable that the father's *lex domicilii* at the former time deserves consideration, especially where, as opposed to the *lex domicilii* at birth, it recognizes the child as legitimate.² The interests of the child demand, it has been said, that the recognition of his legitimacy in either domicile should be decisive.³ There is no authority in point, but it is probable that the English courts would regard the domicile at the time of birth as decisive and would not adopt the principle of the most favourable law. A somewhat analogous question arises in the case of a posthumous child, whose mother has changed her domicile since the death of her husband. Is the *lex domicilii* of the father at the time of his death or the *lex domicilii* of the mother at the time of the child's birth to determine the question of legitimacy? The latter is probably the correct solution. The domicile of origin of a posthumous child is generally that of his mother,⁴ and since his father is dead, the question of his legitimacy concerns him and his mother alone.

Discussion of the relevant decisions It remains to consider whether the authorities support the view, that the test of legitimacy is that which is recognized by the law of the child's domicile of origin. There are three relevant decisions: *Shaw v. Gould* (House of Lords, 1868); *In re Paine* (Bennett J., 1940); and *In re Bischoffsheim* (Romer J., 1948).

Shaw v. Gould In *Shaw v. Gould*⁵ certain funds were bequeathed by a domiciled Englishman in trust for Elizabeth Hickson for her life and after her death in trust for her 'children'. Certain English land was also devised

¹ *In re Salaman*, [1908] 1 Ch. 4. But see *Elliot v. Lord Foigny*, [1935] A.C. 209.

² In Denmark the date of conception is apparently preferred to the date of birth, Wolff, s. 359.

³ Taintor, 18 *Canadian Bar Review*, pp. 596-7.

⁴ There seems to be no English authority upon the domicile of a posthumous child, but juristic opinion favours the view that it is the same as the mother's: Westlake (7th ed.), s. 250; Dicey, p. 88; Nelson, p. 19; Foote (5th ed.), p. 78.

⁵ (1868), L.R. 3 H.L. 55.

after her death to 'her first and other sons *lawfully begotten*'. Elizabeth, at the age of sixteen, was induced by fraud, without the knowledge of her family, to marry a domiciled Englishman, named Buxton, at Manchester. Her friends, however, succeeded in taking her away just after the ceremony, and she never lived with her husband for a single day. Sixteen years later, Elizabeth, having become engaged to a domiciled Englishman named Shaw, devised a scheme for obtaining a divorce in Scotland from Buxton. Shaw acquired a domicile in Scotland, and Buxton was paid £250 to go to that country for forty days. The marriage was dissolved by the Court of Session. Elizabeth then married Shaw in Edinburgh and had by him two daughters and one son, all of whom were born in the lifetime of Buxton. At the time of the present action Buxton, Elizabeth and Shaw were dead. The questions before the English court were whether the daughters and son were entitled under the will of the testator to the funds as being the 'children' of Elizabeth, and also whether the son was entitled to the land as being her 'son lawfully begotten'.

Evidence was given that by Scottish law the divorce and second marriage were valid. Also, that children born of a putative marriage, i.e. one regular in point of form but void owing to the prior existing marriage of one of the parties, were regarded as legitimate, provided that the parents were justifiably ignorant of the prior existing marriage. It was the opinion of the Scottish advocates who gave evidence that justifiable ignorance existed if the parents believed in the validity of the divorce.

The House of Lords unanimously held that the children were not entitled to take under the will.

The reason that appears to have impressed their Lordships was the supposedly logical one that since Buxton, and therefore Elizabeth, remained domiciled in England, the union between Elizabeth and Shaw was not a valid marriage according to English law, and that therefore the children were not born in lawful wedlock (which is the test of legitimacy according to English domestic law). Lord Colonsay, though impressed with the logic of the reasoning, was perplexed with doubts as to whether the status of legitimacy ought to be denied to the children. He felt that this denial was difficult to reconcile with general principles of jurisprudence or with the generally recognized rules of international law.¹

It is difficult to resist the conclusion that the House of Lords lost its direction through its persistent concentration upon one general principle to the exclusion of others. It certainly is a general principle that a divorce not recognized

Failure of court to distinguish status of children from that of parents

¹ At pp. 96-97.

as valid by the *lex domicilii* of the husband is invalid in England. But then, the dicta that have been cited above appear to establish another principle, that legitimacy is determined by the *lex domicilii* of the father at the time of the child's birth. Both these principles demanded attention in *Shaw v. Gould*. There is nothing inconsistent in them. They are not mutually antagonistic. It was easy to argue in this manner:

The father cannot be granted the status of a husband, since the woman whom he purported to marry is, owing to the continuance of her earlier marriage, the wife of another man. Therefore the children of the father by this woman cannot be regarded as legitimate.

Nevertheless, the conclusion is a *non sequitur*. The issue was the status of the children, not of their parents. The fact that Mrs. Buxton could not claim to be Mrs. Shaw was not necessarily a bar to the legitimate status of the children. The legitimacy of a child happens to depend according to English domestic law upon the validity of the marriage of which he was born, but this is not the case in all legal systems. If the two questions are separable by the law of the child's domicil of origin, they should be kept separate by an English court when dealing with a conflict of laws case. The courts of other countries have found no difficulty in this. Thus in South Africa it was held that the children of a polygamous union, born when the father was domiciled in India, were to be regarded as legitimate in Natal, which was his domicil at death. For the purpose of fixing the rate of succession duty payable on the father's death, the status of the mother as a 'wife' was tested by the internal law of Natal, but the status of the children was referred to their domicil of origin.¹

'It is essential', said Innes C.J., 'to bear in mind the distinction between the points to be decided in each instance. With regard to the wife, the issue is the validity of the marriage to which she is a party; with regard to the children, the issue is their right to the status of legitimacy. The wife's position cannot be considered apart from the marriage, but the position of the children may be.'

In the New York case of *In re Hall*,² the court took the same line in circumstances somewhat similar to those in *Shaw v. Gould*. A woman obtained a divorce in Dakota, which was not regarded as valid in New York. She then married in Dakota

¹ *Seedat's Executors v. The Master*, [1917] A.D. 302.

² [1901] 61 App. Div. 266.

a man domiciled in that State, and a child was born of the marriage. It was held that the child was legitimate for the purpose of taking under the will of a testator who died domiciled in New York.

It is significant that in the much later case of *In re Stirling*,¹ Swinfen Eady J. was far from repudiating the suggestion that a child might be legitimate although the previous divorce of one of his parents was invalid. It was not necessary, however, to decide the point, for it was held that the doctrine of putative marriage, upon which the argument for the child turned, did not obtain in Scotland unless at least one of the parties was ignorant of the impediment that invalidated the second marriage. The party had to be mistaken as to some fact. The ignorance alleged was that the mother of the child was unaware that her divorce from her first husband was invalid, but this was an error of law, not of fact.

*In re Paine*² has already been discussed.³ The question, it *In re Paine* will be recalled, was whether the children of *W* were legitimate for the purpose of a disposition contained in the will of an English testatrix.

In 1875 *W*, when domiciled in England, was married in Germany to the widower of her deceased sister. At that date a marriage between such persons was prohibited. The husband was held to have been domiciled in Germany at the time of the ceremony. The parties cohabited in England until the husband's death in 1919.

Bennett J. adopted the dual domicile doctrine of capacity⁴ and held the three children of the union to be illegitimate, since they had sprung from a void marriage. In other words he explicitly applied the English criterion of legitimacy, birth in lawful wedlock, to the question and made no reference to German law though he felt himself bound on the evidence to hold that the husband had never lost his German domicile of origin.⁵

The facts of the last case, *In re Bischoffsheim*,⁶ were as *In re Bischoffsheim* follows:

In 1919 *W* was married in New York to *H*, the brother of her deceased husband. It may be taken that both parties were at that time

¹ [1908] 2 Ch. 344.

² [1940] Ch. 46.

³ *Supra*, p. 306.

⁴ *Supra*, pp. 305 et seqq.

⁵ Unless the full evidence is omitted from the reports, this was a somewhat curious finding, for the husband was resident in England for a short time before the marriage and remained resident there until his death forty-four years later. See the report of the case in 161 L.T. 266.

⁶ [1948] Ch. 79.

domiciled in England. The marriage was void by English law, but valid by the law of New York. After they had acquired a domicile in New York a son was born to them. The question was whether the son was the legitimate child of his mother so as to entitle him to benefit under the will of a testator who had died domiciled in England.

Romer J. held in favour of the son on the ground that legitimacy is a question of status to be determined by the law of his domicile of origin, which is the law of the domicile of the parents at the time of the birth of the *propositus*.¹ No mention was made of *In re Paine*. The learned judge boldly distinguished *Shaw v. Gould* on the ground that in that case the Lords concentrated their attention entirely upon the validity of the Scots divorce, i.e. upon the status of the parents, not upon the status of the children. He said:

'On the sequence of reasoning which was adopted by the House in their approach to the case as a whole, a claim founded on international acceptance of a status conferred by what was certainly the domicile of origin, if the validity of the divorce was disregarded as irrelevant, namely, by the law of Scotland, could not succeed or, indeed, arise; it was, so to speak, still-born.'²

The decision has been adversely criticized in some circles,³ approved in others.⁴ That it represents common sense can scarcely be doubted. Moreover, it may be upheld on an alternative ground, if the latest judicial statements are correct in saying that by English private international law the essential validity of a marriage is determined by 'the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage'.⁵ Although Romer J. did not on his reasoning find it necessary to decide whether the parties had lost their English domicile at the time of their marriage, it was admitted that before the marriage they had agreed to settle permanently in New York.

Possible explanations of *Shaw v. Gould* What, then, is the present law on the subject? Can these decisions be satisfactorily explained and reconciled? There are three possible explanations.

(1) A case of construing an English will First, it might be said that the *ratio decidendi* in *Shaw v. Gould* is that the legitimacy of a beneficiary under the will or

¹ See the excerpt from his judgment, cited *supra*, p. 394.

² At p. 91.

³ 12 *Conveyancer*, 223 (J. H. C. Morris); 63 *L.Q.R.* 74 (R. S. Welsh); 64 *L.Q.R.* 199 (F. A. Mann); *Canadian Bar Review* (1949), 1163 (Falconbridge); Dicey, p. 491.

⁴ Wolff, p. 388.

⁵ *De Reneville v. De Reneville*, [1948] P. 100, at p. 114, *per* Lord Greene; *supra*, pp. 356-7.

intestacy of a person domiciled in England is purely a question of construction to be determined by the internal law of England as being the *lex successionis*. A learned writer has argued with force that this is the true explanation.¹ Thus in the court below, *Kindersley V.-C.* said:²

'Now the will, being a will made in England by a domiciled Englishman, must be construed according to the law of England. Every term in it must receive that interpretation which belongs to it according to English law. What is the interpretation which the law of England gives to the term "children"? Undoubtedly children lawfully begotten *ex justis nuptiis procreatos*.'

This reasoning, though vigorously attacked by counsel, evidently impressed Lord Chelmsford, who said:

'Whatever may be the views of the Scotch Courts as to the legitimacy of the appellants, your Lordships are called upon to determine whether they answer a particular description upon principles of English law, and by the rules of construction of an English will. It is clear that the words "son lawfully begotten" and "children" in the will in question can apply only to legitimate children.'³

If this was the substantial ground of the decision, then *In re Bischoffsheim* was wrongly decided and the reasoning of Bennett J. in *In re Paine* was sound.

It is submitted, however, that this is not the correct approach to the question whether a beneficiary domiciled abroad is entitled to take under an English testacy or intestacy. The accurate principle surely is that English law, *qua* the *lex successionis*, ordains as a matter of construction that 'children' means legitimate children, but that it then leaves this question of status to be determined by the *lex domicilii* of the *propositus*. 'I am of opinion', said Cotton L.J., 'that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of England, except in the case of succession to real estate in England, recognizes and acts on the status thus declared by the law of the domicil.'⁴ That is the established principle for cases of legitimation and it is incomprehensible that legitimacy should be treated differently. As Romer L.J. remarked in *In re Bischoffsheim*, there is no real distinction between legitimacy and legitimation.⁵ The emergence

This explanation appears unsound

¹ R. S. Welsh, 63 *L.Q.R.* 82-85.

² *Sub nom. In re Wilson's Trusts* (1865), L.R. 1 Eq. 247, at pp. 263-4.

³ (1868), L.R. 3 H.L. 55, 59; italics supplied.

⁴ *In re Goodman's Trusts* (1881), 17 Ch.D. 266, 299.

⁵ [1948] Ch., at p. 92.

of the principle, however, has been slow and painful, and it may be that the expediency of its extension to legitimacy still perplexes certain of the judges. The decisions dealing with the question whether the English domestic test of birth in lawful wedlock must be applied to a beneficiary claiming to take under an English testacy or intestacy do not afford a remarkable example of judicial harmony. This is the history of the cases:

1863, *Boyes v. Bedale*,¹ concerned with the *legitimation* of a claimant under an English *will*, insisted that the test must be satisfied.

1865-8, *Shaw v. Gould* accepted the test where the issue was the *legitimacy* of a claimant under an English *will*.

1881, the Court of Appeal in *In re Goodman's Trusts*² overruled *Boyes v. Bedale* and discarded the test where the issue was the *legitimation* of a claimant under an English *intestacy*.

1883, *In re Andros*³ discarded the test where the issue was the *legitimation* of a claimant under an English *will*.

1892, *In re Grey's Trusts*⁴ discarded the test where the issue was the *legitimation* of a claimant under a *devise* of English land.

1940, *In re Paine*⁵ imposed the test where the issue was the *legitimacy* of a claimant under an English *bequest*.

1948, *In re Bischoffsheim*⁶ discarded the test where the issue was the *legitimacy* of a claimant under an English *bequest*.

That there should be one test for legitimation, another for legitimacy, argues some confusion of thought and is a proposition that on principle has nothing whatsoever to commend it.

(ii) The invalid divorce was the decisive element

Secondly, it might be said that legitimacy is a question of status determinable by the law of the domicile of origin, except in the one case where the recognition of the status would compel the court to uphold a foreign divorce that is ineffective according to English private international law. In other words, the two principles, that legitimacy is a matter for the law of the domicile of origin and that no divorce is valid unless valid by the law of the common domicile, may come into conflict with each other, in which event the latter must prevail. This, perhaps, is the most that *Shaw v. Gould* decided.

On this hypothesis, *In re Bischoffsheim* is reconcilable with *Shaw v. Gould* and the reasoning in *In re Paine* is wrong.

(iii) A decision founded upon the peculiar circumstances

The third possibility is that *Shaw v. Gould* ought to be regarded as an abnormal decision, strictly limited in its effect to its own exceptional circumstances. 'My opinion in this case',

¹ (1863), 1 H. & M. 798.

³ (1883), 24 Ch.D. 637.

⁵ *Supra*, pp. 306, 399.

² (1881), 17 Ch.D. 266.

⁴ [1892] 3 Ch. 88.

⁶ *Supra*, p. 399.

said Lord Chelmsford, 'is founded entirely upon the peculiar circumstances attending it.'¹ It was, indeed, distinguished by a number of special features among which may be mentioned the following:

The Scots divorce was granted in 1846, eleven years before judicial divorce was possible in England and at a time when the prevalent view, in accordance with the unanimous opinion of the judges in *Lolley's Case*,² was that no foreign proceeding in the nature of a divorce could affect a marriage that had been contracted in England. In fact, in the court of first instance, Kindersley V.-C. said: 'By the English law of marriage, an English marriage is absolutely indissoluble by the sentence of any court (of course I am speaking of the law as it stood at the time of the transactions in question which was long before the Act establishing the Divorce Court). . . . Any decree or judgment or sentence of any foreign court, purporting to dissolve such marriage, is treated as a mere nullity.'³ It must be observed, however, that this view did not appeal to the House of Lords.

The conduct of the Shaws was calculated to arouse the suspicion of any court. In the greatest secrecy and with every precaution against discovery, they contrived a scheme to obtain a divorce in a court which, to their knowledge, had no jurisdiction in the eyes of English law.⁴

The children were legitimate by Scots law if either of the Shaws was justifiably ignorant that there was an impediment to their marriage, i.e. in their case, a prior invalid divorce. After a careful examination of the facts, Kindersley V.-C. found himself unable to agree that even Mrs. Shaw was justifiably ignorant of the true position.

Another fact which may have influenced the decision was that the will was not confined to a gift of movables to the children of Elizabeth, but also included a devise of English land to her 'first and other sons lawfully begotten'.

It is submitted that this third explanation, which restricts *Shaw v. Gould* to its own peculiar facts, is correct. On that assumption, legitimacy is a question of status and *In re Bischoffsheim* should be preferred to *In re Paine*.

II. LEGITIMATION⁵

A. *The Law that Determines whether Legitimation is Effective*

In the various legal systems of the world at least three different methods are found by which a person, not born with

Method of
legitima-
tion

¹ *Shaw v. Gould* (1868), L.R. 3 H.L. 55, at p. 79.

² (1812), 2 Cl. & F. 567 (N). The view was finally repudiated in *Harvey v. Farnie* (1882), 8 App. Cas. 43.

³ L.R. 1 Eq. at pp. 257-8.

⁴ For the details see L.R. 1 Eq. at pp. 260-2.

⁵ On the subject generally see articles by Taintor in 18 *Canadian Bar Review* (1940), 589 et seqq. and 691 et seqq.; and by Mann in 56 *L.Q.R.* 112 et seqq.

the status of legitimacy, may be later legitimated. These are: subsequent marriage of the parents; recognition of the child by the father; and adoption. Each of these methods requires separate treatment.

1. *Legitimation 'per subsequens matrimonium'.*

**Legitima-
tion by
subsequent
marriage** From the time of Constantine, the rule of Roman law was that children born before marriage were made legitimate by the subsequent marriage of their parents. This rule became part of canon law about the twelfth century, and was later adopted by practically all the legal systems on the Continent, and in South America. It has received statutory recognition in most of the North American States. Until the Legitimacy Act of 1926, however, it formed no part of the law of England or of Wales or of Ireland, though it obtained in Scotland, the Isle of Man and the Channel Islands.¹

**Common
law rule
as to
recognition
of legiti-
mation by
subsequent
marriage** The role of private international law is to choose the system of law which shall determine whether legitimation by this method is effective or not. The rule finally established at common law by *In re Grove*,² after some hesitation,³ is that a foreign legitimation *per subsequens matrimonium* is not recognized in England unless the father is domiciled, *both at the time of the child's birth and also at the time of the subsequent marriage*, in a country whose law allows this method of legitimation.⁴

***In re
Goodman's
Trusts*** A simple illustration of the working of the rule is afforded by the case of *In re Goodman's Trusts*,⁵ where a domiciled Englishwoman had died intestate in respect of a large sum of money, and it was necessary to decide which of her brother's children were entitled to share therein, as being her 'next of kin' under the Statutes of Distribution. The relevant events in her brother's life were chronologically as follows:

- (a) While domiciled in England he had three children by Charlotte Smith, to whom he was not married.
- (b) He acquired a Dutch domicile, and had a fourth child, Hannah, by Charlotte Smith.
- (c) He married Charlotte Smith in Amsterdam.

¹ For a full account of the acceptance of the rule see 36 *L.Q.R.* 255.

² (1887), 40 Ch.D. 216.

³ See, for example, *Boyes v. Bedale* (1863), 1 H. & M. 798, disapproved by C.A. *In re Goodman's Trusts*, *infra*.

⁴ *In re Goodman's Trusts* (1881), 17 Ch.D. 266; *In re Andros* (1883), 24 Ch.D. 637; *In re Grove* (1887) 40 Ch.D. 216.

⁵ (1881), 17 Ch.D. 266.

(d) While still domiciled in Holland he had a fifth child, Anne, by Charlotte Smith.

Legitimation by subsequent marriage is part of Dutch law. It was, therefore, held on the above facts that Hannah and Anne were alone legitimate for the purposes of the English intestacy. It was only in their cases that at the two critical moments, birth and marriage, the *lex domicilii* of the father recognized this particular form of legitimation.

This common law rule, that the father's domicil at both dates must recognize legitimation, applies not only to persons claiming money or other chattels personal upon intestacy, but also to a gift by will of personal chattels¹ or of freehold land,² if made to persons covered by some general descriptive title such as 'children'.

It is unnecessary, however, to consider this common law principle further, for, though not abrogated, its operation is immensely curtailed by the Legitimacy Act, 1926,³ which makes legitimation by subsequent marriage part of the law of England. The first section of the statute alters the internal law of England and provides that where the parents of an illegitimate person marry, or have married, one another, whether before or after the commencement of the Act, the marriage shall, if the father was or is *at the date of the marriage* domiciled in England or Wales, render that person, if living, legitimate. Such legitimation becomes effective on 1 January 1927 (the date of the commencement of the Act) if the marriage took place previously, but if not, then from the date of the marriage.⁴

With regard to persons who are not domiciled in England or Wales, section 8 (1) provides as follows:

'Where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, and the father of the illegitimate person was or is, *at the time of marriage*, domiciled in a country other than England or Wales, by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage, that person, if living, shall in England and Wales be recognized as having been so legitimated from the commencement of this Act or from the date of the marriage, whichever last happens, notwithstanding that his father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law.'⁵

Legitima-
tion by
subsequent
marriage
adopted by
English law

Marriages
where
spouses
domiciled
abroad

¹ *In re Andros* (1883), 24 Ch.D. 637.

² *In re Grey's Trusts*, [1892] 3 Ch. 88.

³ S. 1 (1).

⁴ 16 & 17 Geo. V, c. 60.

⁵ S. 8 (1).

This sub-section is the one that affects private international law, and it discards the old rule that the *lex domicilii* of the father at the time of the child's birth must be taken into account. The *lex domicilii* of the father at the time of marriage is the sole decisive factor. It is this law which decides, for instance, whether something more than mere marriage, such as a formal acknowledgement, is necessary to effect legitimation.

Cases in
which
common
law still
applicable

It has been decided that this sub-section is an addition to, not a replacement of, the common law principle.¹ The rule laid down by *In re Grove*² may therefore still be invoked in at least three cases.

First, where it is desired to prove that a child was legitimated before 1927, for no marriage celebrated before that date is effective for the purpose of the Act.

Secondly where it is desired to establish the legitimation of an *adulterinus*. To be born of adultery is no bar to legitimation in some legal systems,³ but the Legitimacy Act, taking the austere view, provides that:

'Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born.'⁴

Since, however, it is still possible to fall back on the common law, an *adulterinus*, whose father was domiciled, say, in Germany at the two critical dates of birth and subsequent marriage, will not be prevented from establishing his legitimate status.⁵

Thirdly, it is necessary to fall back on the common law if a person, alleged to have been legitimated, claims under a will or other instrument that came into operation before the date of his legitimation. Thus, in one case:

An English testator died in 1939 and bequeathed certain legacies to the children of his daughter, X. In 1943, X gave birth to an illegitimate son whose father was a man domiciled in Italy. In 1949, she married the father while he was still domiciled in Italy.⁶

The fact that the subsequent marriage legitimated the son under the Act did not entitle him to claim as a beneficiary

¹ *In re Hurll*, [1952] Ch. 722.

² *Supra*, p. 404.

³ Wolff, op. cit., p. 395.

⁴ S. 1 (2). This section does not strike effectively at adulterous intercourse, since it refers to the birth, not to the conception, of the child; *In re Heath*, [1945] Ch. 417.

⁵ W. E. Beckett 12 *B.T.B.I.L.* (1931), 186; 13 *B.T.B.I.L.* (1932), 173, 182-3; citing *Collins v. A.-G.* (1931), 47 T.L.R. 484. ⁶ *In re Hurll, supra*.

under the will, for the section which states the proprietary rights of a person so legitimated provides that he shall be entitled to take any interest under a disposition coming into operation *after* the date of legitimation. Since the son was legitimated in 1943, he could not therefore claim that by virtue of the Act he was entitled under a will that had come into operation four years earlier. Quite apart from the Act, however, his legitimation was valid at common law since his father was domiciled in Italy at the decisive dates of birth and marriage, and at common law it is wholly irrelevant for the purpose of claiming under an instrument of gift whether the instrument comes into operation before or after the legitimation. The son, therefore, was entitled to the legacies independently of the Act.

2. *Legitimation by recognition.*

In several States in Europe and in North and South America a father is allowed to legitimate his child by formally recognizing it to be his own. This method derives from the *legitimation per rescriptum principis* of Roman Law. The first question that it raises in private international law is—By what legal system will the English courts determine the validity of this particular form of legitimation? Is it sufficient that it is valid by the *lex domicilii* of the father at the time of recognition, or, like legitimation *per subsequens matrimonium* before the Legitimacy Act, 1926, must it also be valid by the *lex domicilii* of the father at the time of the child's birth? The matter has been considered in only one case—*In re Luck's Settlement Trusts*¹—where the facts were as follows:

What law decides validity of recognition?

Under the will of George Luck, a British subject domiciled in England, certain funds were held in trust for all his children attaining twenty-one. Each child was to receive the income of his share for life, and after his death the capital was to be divided equally among his children at twenty-one. The marriage settlement of George limited further sums in the same manner, except that only those grandchildren born within twenty-one years of the death of the survivor of George and his wife were to take a share of the capital. The survivor died in 1896. Therefore, no grandchild was entitled under the settlement trusts unless he was alive and legitimate in 1917 at the latest. *In re Luck*

Charles was a son of George Luck. He married in 1893, but in 1906, while still married, he became the father of an illegitimate son, David, in California. At this time both he and David's mother were domiciled in England. After the dissolution of his first marriage he married a

¹ [1940] Ch. 864.

second wife. In 1925 he signed a formal document with the assent of his second wife by which he acknowledged David to be his legitimate son and adopted him as such.¹ At this time Charles was domiciled in California. It was assumed by the Court of Appeal that David's mother was also domiciled there. By the law of California the acknowledgment of 1925 operated to legitimate David from his birth in 1906.

The question that arose on these facts was whether David was entitled to a share under the will and marriage settlement of his grandfather, George. To take under the latter he was required to be a legitimate grandchild alive as such in 1917.

The Court of Appeal, reversing Farwell J., held that David was entitled neither under the will nor under the settlement. The reasoning was that legitimation by subsequent marriage is disregarded at common law unless allowed by the *lex domicilii* governing the father at the time both of the birth and the marriage; that the relevant judgments regard this rule, not as confined to the single case of a subsequent marriage but as applicable to all forms of legitimation; and that in any case both convenience and principle demand the application of a uniform rule to all forms. Therefore David was disqualified, since at the time of his birth his father was subject to English law, by which legitimation by recognition is not allowed.

Criticism
of the
decision

It is submitted that this equation of recognition with legitimation by subsequent marriage is unwarranted. It is essential to a proper understanding of the matter to realize why the common law regards the domicile of the father at the time of the child's birth as vital in the particular case of legitimation by subsequent marriage. The theory, originating in Roman law, is that at the time of the birth the father implicitly contracts to marry the mother at a later date and thereby to legitimize the child. It follows from this that if at the time of the birth the father is domiciled in a country where a later marriage cannot alter the status of the child, he cannot make a valid contract concerning legitimation.² In other words the child at birth must possess, according to the *lex domicilii* of his father, a potential capacity to be legitimated by the subsequent marriage of his parents.³ Otherwise he bears throughout his life the indelible

¹ It is important to notice, as F. A. Mann has shown (57 *L.Q.R.* 119), that the Californian method was not adoption, but legitimation by recognition. The unwary might assume from the judgments in the Court of Appeal that it was equivalent to adoption in the English sense.

² *In re Wright's Trusts* (1856), 2 K. & J. 595, 604-5.

³ *In re Luck*, [1940] Ch. 864, at pp. 883, 896; *In re Grove* (1887), 40 Ch.D. 216, at p. 233.

stain of bastardy. There may have been some slight justification for this far-fetched theory of a fictitious contract in the internal law of Rome, of which *legitimatio per subsequens matrimonium* was a regular feature, but its extension to the sphere of private international law and to other forms of legitimation is the negation of common sense and principle. It is surely pure fantasy to suggest that the recognition of a child as legitimate is merely the performance of a contract made at his birth, and that if the contract is void at that date because the *lex domicilii* of the father does not allow such legitimation, then a recognition, though effected at a time when the father and son have acquired a new domicil, is perforce void. 'Times are not what they once were, and we live in an age too practical to build our law upon the unstable foundation of fictions.'¹ To make the child's potential capacity at birth relevant to his acquisition of a certain status at a later date is contrary to established principle, for the question of his present status depends upon his present domicil, not upon one that he may have had at some earlier stage in his life. The common law rule based upon the child's capacity at birth was never in fact extended to cases other than legitimation by subsequent marriage. It has been abolished even in this connexion by the Legitimacy Act, 1926, and gratuitously to prolong its life and to extend its operation is a retrograde step. The retrogression is very clear when tested by the standards of natural justice. Luxmore L.J. after insisting that the *lex domicilii* at birth must contain the potentiality of subsequent legitimation proceeds as follows:

'It is, in our opinion, only within these narrow limits that the English law recognizes an exception to the principle that bastardy is indelible, a principle which it always steadfastly maintained in opposition to the civil and the canon law, save in so far as it was forced to recognize an exception in cases of persons not domiciled in England.'²

But to continue this steadfastness to the true faith, after its abandonment by the legislature in the most frequent type of legitimation, savours of a determination to visit the sins of a father upon his children. In fact the decision has been most generally criticized on the ground that, though it is obviously convenient that one principle should govern all types of legitimation, it is a little eccentric to choose one that has been abrogated by statute.³

¹ *Blythe v. Ayres* (1892), 96 Cal. 532, Lorenzen, p. 756, per Garoutte J.

² *In re Luck*, [1940] Ch. 864, at p. 883.

³ 21 *B.Y.B.I.L.* 209; 18 *Canadian Bar Review*, 652; 57 *L.Q.R.* 120.

View of
Scott L.J. It is therefore to be hoped that if the occasion arises the highest tribunal will prefer the dissenting judgment of Scott L.J. who agreed with Farwell J. in the court below. Scott L.J. argued in a convincing manner and at no little length that status, the outstanding characteristic of which is its 'quality of universality', once determined by the law of the domicile, must be judicially recognized all the world over. At a time when David and his father and mother were domiciled in California, his father made a certain declaration according to Californian law. The effect of this by that law was to clothe David with the status of a legitimate person. Therefore, 'that status, established by the law of that foreign country, was under English law one which it was the duty of the English court to recognize, and *prima facie* to enforce in accordance with its nature and attributes as determined by the law of that country'.¹ It is the law of the domicile at the time when the legitimation is effected that should alone be considered.

The true
solution of
In re Luck

The majority of the judges were perturbed by the idea that the law of California might alter the status of David at a time when he was a domiciled Englishman, a position which would arise if the recognition of 1925 were regarded as relating back to the date of his birth. This would indeed be objectionable in principle, but if the unnecessary suggestion of relating back had not been made, and if the legitimation had been construed by the court as operating from the time of the recognition, there would have been no break with principle. The law of California is entitled to create the status of legitimation between two persons domiciled in that State.² 'And on this view, which we suggest to be really the best view, David would be recognized as having been legitimate only as from 1925, but not before, and therefore he would have been able to take under the trusts established by the will, but possibly would not have been able to take under the marriage settlement trusts, because he was not a legitimate child in 1917.'³

3. *Adoption.*

Nature
of the
problem
to be
considered

Adoption, since it creates the relationship of parent and child between the parties, is justifiably regarded as a form of legitimation, despite the fact that the adopted person may already be the legitimate child of his own blood parents. It is an

¹ At p. 888.

² 18 *Canadian Bar Review*, 624.

³ W. E. Beckett, 21 *B.Y.B.J.L.* 210. It is submitted that David could certainly not have taken under the settlement.

institution that exists in many countries, though there is considerable diversity in the methods by which it is completed, as well as in the effect that it produces upon the position and the mutual rights of the parties.¹ It is a little doubtful whether the question that it raises in private international law is one of jurisdiction or of choice of law. Some countries, including England, require an adoption order to be made by a court, and if this system were universal the question would be—What renders a court competent to issue an order that will command extra-territorial validity? On the other hand the status of adoption may be created in some countries by agreement between the parties, fortified by the consent of certain relatives, and in such a case as this the appropriate question would be—What system of law determines whether the status has been created? It is submitted that the latter is the correct line of approach. The substantial inquiry is not whether the official, if any, who effected the adoption possessed jurisdiction in the international sense, but whether the legal system under which the status has been created has a paramount claim to govern the matter.

There is no English authority, statutory or judicial, upon what in general constitutes the governing law. Neither is there agreement among foreign legal systems. In some the personal law of the child governs, in others the personal law of the adopter is preferred, but in most the doctrine of cumulation prevails by which the personal law of both parties must be satisfied.² There is little doubt that this last solution is correct in principle. Adoption alters the status of both parties, and therefore to attract extra-territorial recognition it must be valid according to each *lex domicilii*. Where one of the parties is domiciled in England, however, an adoption cannot be valid unless it is effected by an order of the court.

What law
governs
adoption?

The circumstances in which the court possesses jurisdiction to make an order are specified in the following provisions of the Act:

‘Subject to the provisions of this Act, the court may, upon an application made in the prescribed manner by a person *domiciled in England*, make an order (in this Act referred to as an adoption order) authorizing the applicant to adopt an infant.’³

¹ Wolff, p. 398; 57 *L.Q.R.* 112–13.

² 57 *L.Q.R.* 123; Wolff, p. 398; 5 *I. & C.L.Q.R.* 209–10.

³ Adoption Act, 1950, s. 1 (1).

'An adoption order shall not be made in England unless the *applicant and infant reside in England*.'¹

The problems capable of arising in the field of private international law may be considered against this statutory background.

English adoption of child domiciled abroad First, an applicant domiciled and resident in England applies for an adoption order in respect of an infant domiciled abroad but resident in England.

The question here is whether the court will have any regard for the conditions, perhaps differing widely from the English equivalents, that are imposed by the *lex domicilii* of the infant. The answer is that the court is completely free, so far as its statutory powers are concerned, either to grant or to withhold the order. It has a discretion. It may, and indeed it should, consider the foreign law, but the overriding consideration is the welfare of the infant,² and if it comes to the conclusion that this will be promoted by the adoption it is at any rate competent under the statute to make an order subject to the necessary consents being obtained.³

Foreign adoption The second question concerns the recognition by English law of a foreign adoption, and this must depend upon the domicile of the parties at the time when the adoption is concluded.

Parties domiciled abroad If the parties were domiciled at that time in the country of adoption, English law cannot do other than recognize the status thus imposed upon them by their personal law. This, however, does not mean, as will be shown later,⁴ that for all purposes they are to be treated exactly as if they are related to each other as parent and child.

One party domiciled in England If, on the other hand, either party is domiciled in England, then, presuming the doctrine of cumulation to be correct, it is submitted that the adoption will not be recognized in England unless it is followed by an order of the English court, for English law, *qua* the *lex domicilii* of the one party, must be satisfied. It will not be sufficient, even, that the foreign adoption has complied with the substantive rules of the Act of 1950 concerning the age and sex of the respective parties and the consents of parents and guardian, for a judicial examination of the circumstances with the object of protecting the welfare of the infant is an integral and vital part of the English system.⁵

¹ Adoption Act, 1950, s. 2 (5); *Re Adoption Application No. 52/1951*, [1952] Ch. 16.

² Adoption Act, 1950, s. 5 (1) (d). ³ *Ibid.*, ss. 2 (4); 3. ⁴ *Infra*, p. 414.

⁵ Compare *In re Wilson, Grace v. Lucas*, [1954] Ch. 733; 3 *I.L.Q.R.* 267 et seqq.

B. *The Effect in England of a Foreign Legitimation*

Once it has been ascertained that a child has acquired the status of a legitimated person under the appropriate law or laws, a further question arises. By what law are the legal rights and liabilities incidental to that status to be tested? It seems clear that these are determined by the *lex domicilii* of the father at the date of the legitimation. The *creation* of the status may have required a reference to two laws, the law of the domicile at the time of the birth and of the legitimation, but the *attributes* of the status, its effect and consequences, are determined solely by the law of the father's domicile at the date of the legitimating event, whether that event be marriage or something in the nature of recognition. The effect of the status in England will be exactly what it is according to the foreign *lex domicilii*. 'The law of England, except in the case of succession to real estate in England, recognizes and acts on the status thus declared by the law of the domicile.'¹

Lex domicilii of father at time of legitimation determines the attributes of the status

Suppose for instance that the legitimated person claims to take under an English will or settlement or under an intestacy as being the 'child', 'issue', 'descendant', or 'next of kin' of the settlor or intestate.

Even apart from the authorities the method of approach to the problem seems clear.² The first step is to examine the incidents attached to the status of a legitimated person by the foreign *lex domicilii*. The object of this is to ascertain whether under that law the relations between the parent and the child correspond to those between a parent and a child born in lawful wedlock.³ If this is found to be the case, the legitimated child must be regarded for the purposes of English law as having the same rights as a child born in lawful wedlock. The law of England, as being for instance the law of the testator's last domicile, determines the class of persons to take under the will, namely legitimate children, but whether a legitimated person falls within that class is determined by the law of his father's domicile at the time of the legitimation. It is irrelevant that he would not have been entitled to claim under the will as a 'child' had he been subject throughout to English internal law.

Notice, also, the stringent provisions against sending British subjects abroad for adoption; Adoption Act, 1950, ss. 39 and 40.

¹ *In re Goodman's Trusts*, (1881) 17 Ch.D. 266, 292, *per* Cotton L.J. Another exception is adoption, *infra*, p. 414.

² But see 57 *L.Q.R.* 124 *et seqq.*

³ 18 *Canadian Bar Review*, 694 *et seqq.*

The
English
decisions

This was the view ultimately taken at common law when children, legitimated by the subsequent marriage of the parents, claimed rights under the testacy or intestacy of a person dying domiciled in England.¹ In *Skottowe v. Young*,² in 1871, it was held that a child, born out of wedlock to parents domiciled in France who later intermarried in that domicile, was not 'a stranger in blood' to his father within the meaning of the English Legacy Duty Act. Ten years later a child, legitimated by the marriage of his parents in their Dutch domicile, was allowed to take as the next of kin of a person who died intestate domiciled in England.³ In another case a testator domiciled in England had bequeathed personalty to the 'children' of a domiciled foreigner, and it was held that the bequest included children legitimated by subsequent marriage.⁴ Kay J. reduced the problem to a series of questions:

'What did the testator intend by his gift? That is answered by the rule of construction. He intended *A*'s legitimate children. If you ask the further question—Did he intend his children who would be legitimate according to English law, or his actual legitimate children? How can the rule of construction answer that?'

Finally, it was held that a devise of English land to the children of *A* included children legitimated according to his *lex domicilii* by his subsequent marriage.⁵

Exceptional
case of
adoption
status

There are, however, two exceptions to the rule that English law acts on the status declared by the law of the domicile. The first is that the parties to an adoption, valid according to the law of their foreign domicile at the time of its completion, are not regarded as related to each other as parent and child for the purpose of claiming an interest under an English intestacy or under an instrument governed by English law unless, of course, an adoption order has also been obtained in England. The question of intestacy has arisen in connexion with the section of the Adoption Act, 1950, which provides that if, after the making of an adoption order, the adopter or the adopted person or any other person dies intestate in respect of real or personal property other than an existing entailed interest, that property

¹ In a series of cases from 1856 to 1877 the opposite view was taken: *In re Wright's Trusts* (1856), 25 L.J. Ch. 621; *Boyes v. Bedale* (1863), 1 H. & M. 798; *Levy v. Solomon* (1877), 37 L.T. 263.

² (1871), L.R. 11 Eq. 474.

³ *In re Goodman's Trusts* (1881), 17 Ch.D. 266; *supra*, p. 404.

⁴ *In re Andros* (1883), 24 Ch.D. 637.

⁵ *In re Grey's Trusts*, [1892] 3 Ch. 88.

shall devolve as if the adopted person were the child of the adopter born in lawful wedlock.¹ Whether this section applies to a foreign adoption arose in the case of *In re Wilby*,² where the facts were as follows:

Mr. and Mrs. *A* adopted *X* according to the law of Burma at a time when all three parties were domiciled in that country. The parties subsequently acquired an English domicil and *X* died intestate, whereupon Mrs. *A* (her husband having died) applied for letters of administration as being the mother of *X*.

The application failed. There had been no English adoption order as envisaged by the Act and the court refused to equate adoption with legitimation for the purpose of ascertaining whether the relation between the parties according to the foreign law of the domicil was that of parent and child. Legitimation and adoption stand on a different footing. The former is a recognition by the law of a natural relationship already existing between the parties, but adoption is an artificial relationship, a 'fictitious consanguinity',³ which is far from being uniform in nature and effect throughout the world. The manner in which it is created and terminated, the conditions as to age and other matters upon which it depends, the objects that it is designed to serve and the legal consequences that it produces vary so widely, that to determine whether a particular foreign conception of the relationship corresponds substantially with the English conception would present the judge with an investigation too intricate and hazardous to merit his attention.

The second exception to the general principle, that the status of a person legitimated in a foreign domicil is recognized in England, arises where he claims as the heir to an English entailed interest. The construction put upon the Statute of Merton, 1235, which declared the common law with regard to the inheritance of land, was that nobody could succeed as heir except a person born in lawful wedlock. To be the legitimate son of the ancestor was not in itself sufficient. Therefore, in *Doe, d. Birrwhistle v. Vardill*,⁴ it was held that a person, born of

Intestate
succession
to English
land an
exception
to the rule

¹ S. 13 (1).

² [1956] P. 174; criticized in 5 *J. & C.L.Q.R.* 210-13. See also *In re Wilson*, [1954] Ch. 733, where, however, the infant only was domiciled in Quebec where the adoption was effected.

³ Wolff, *op. cit.*, p. 398.

⁴ (1826), 5 B. & C. 438; (1835), 2 Cl. & F. 571; opinion of the judges delivered to the House of Lords (1835), 2 Cl. & F. 582; further opinion of the judges (1839), 7 Cl. & F. 895.

parents who were domiciled in Scotland at the time both of his birth and of their subsequent marriage, could not succeed as heir to land in Yorkshire of which his father died intestate. Lord Brougham, who was opposed to the decision, demonstrated the inconvenience of this rule in the following words:¹

‘That a man may be a bastard in one country and legitimate in another seems of itself a strong position to affirm; but more staggering is it when it is followed up by this other, that in one and the same country he is to be regarded as a bastard when he comes into one court to claim an estate in land, and legitimate when he resorts to another to obtain personal succession.’

The justification of the decision, however, was explained forty years later by James L.J. as follows:²

‘What the assembled judges said in *Doe v. Vardill*, and what the Lords held, was, that the case of heirship to English land was a peculiar exception to the rights incident to that character and status of legitimacy, which was admitted by both judges and Lords to be the true character and status of the claimant. It was only an additional instance of the many anomalies which at that time affected the descent of land. . . . But in this particular case, the exception is, at all events, plausible. The English heirship, the descent of English land, required not only that the man should be legitimate, but as it were *porphyro-genitus*, born legitimate within the narrowest pale of English legitimacy.’

It was later decided that a legitimating father could not succeed to his son's land.³ The rule in *Doe, d. Birtwhistle v. Vardill* is now of little importance. Its operation has been, in the first place, severely limited by the Administration of Estates Act, 1925. This statute abolishes heirship in the case of the fee simple estate,⁴ and provides that upon intestacy the land shall be held by the personal representatives upon trust for sale.⁵ The money arising from the sale does not pass to an heir, but is distributed among the relatives of the deceased according to the scheme established by the Act.⁶ The two cases in which it may still be necessary to discover the heir to a fee simple estate according to the old rules of descent are unlikely to arise in

¹ 2 Cl. & F. at 595.

² *In re Goodman's Trusts* (1881), 17 Ch.D. 266, 299.

³ *In re Don's Estate* (1857), 4 Drewry 194. The rule would also seem to apply to a claim of succession to a peerage: *The Strathmore Peerage Case* (1821), 6 Bli. (N.S.) 487; 54 Lords Jo. 554 (where it was held, however, that the claimant had not been legitimated); *Shedden v. Patrick* (1854), 1 Macq. H.L. Cas. 535.

⁴ S. 45 (1).

⁵ S. 33.

⁶ S. 46.

connexion with private international law, and need not be discussed.¹

The result, then, of this Act was that heirship became confined to the case of an entailed interest, so that if the facts of *Doe v. Vardill* had occurred again in 1926 the decision would have been the same, provided that the intestate was a tenant in tail. The rule established by that decision is, however, almost entirely excluded even in the case of an entailed interest, for the Legitimacy Act specifies the limits within which a person legitimated by the subsequent marriage of his parents shall be entitled to take interests in property. It provides that 'a legitimated person and his spouse, children or more remote issue, shall be entitled to take any interest

- (a) in the estate of an intestate dying after the date of legitimation;
- (b) under any disposition coming into operation² after the date of legitimation;
- (c) by descent under an entailed interest *created* after the date of legitimation,

in like manner as if the legitimated person had been born legitimate'.³ A later section extends these provisions to a person recognized as having been legitimated because his father and mother married in a domicile by the law of which a subsequent marriage is a mode of legitimation.⁴

The doctrine of *Doe v. Vardill* will therefore still apply in the case of an entailed interest, if the creation of the entail has preceded the legitimation or if the foreign legitimation has been effected otherwise than by subsequent marriage.

¹ They arise under the Law of Property Act, 1925; i.e. (a) where there is a limitation that would formerly have been caught by the Rule in *Shelley's Case* (s. 131); (b) where there is an express limitation to the 'heir' of a deceased person (s. 132). For this last case see Cheshire, *Modern Real Property* (7th ed.), pp. 748-9.

² This is the date of the testator's death, not the time at which the interest becomes vested or payable, *In re Hepworth*, [1936] Ch. 750.

³ S. 3 (1).

⁴ S. 8 (2).

CHAPTER XIII

INFANCY AND LUNACY

- I. Infancy. *Pages 418-24.*
II. Lunacy. *Pages 424-6.*

I. INFANCY

Position of
guardian
under
English
internal
law

IT is advisable to state in summary form the internal law of England that regulates the tenure of office and the rights and duties of a guardian in a purely domestic case where the infant is domiciled in this country. A guardian, whether he is the parent or a person expressly appointed to the position, is entitled freely to exercise all the powers recognized by English law as appertaining to his office until his authority or his acts are challenged in the courts. His chief personal rights are to retain the custody, to control the education and to forbid the marriage of his ward. His proprietary rights are less defined. A parent as such has no right to the child's property, but it was recognized before 1926 that a testamentary guardian was entitled to manage the real and personal property of the ward and to give valid receipts for legacies and other sums of money, subject, of course, to a strict duty to account for all property that came into his hands. The exact extent of these rights, however, is no longer of great importance, for the general result of the Property Acts which came into force on 1 January 1926, and which apply where the ward is domiciled in England, is to vest the property of infants in trustees or personal representatives, who are given comprehensive powers of management and control over it, including the right to apply income for the benefit of the infants.

Jurisdic-
tion of
English
courts over
infants

The English courts possess a parental and administrative jurisdiction over children which may be invoked either by or against a guardian. If the conduct of the guardian is impugned, he may be removed from his office; if, on the other hand, he has been interfered with in the exercise of his discretion, he may obtain an order from the court that will render his wishes effective. A particular example of this latter proceeding and one that affects private international law occurs where a ward is removed from England without the consent of the guardian.¹

¹ *Hope v. Hope* (1854), 4 De G.M. & G. 328.

In one case¹ the wife of a man resident and domiciled in England took the infant children of the marriage to the United States and kept them there against the wishes of her husband. The children were then made wards of court² and an injunction was granted at the instance of the husband to restrain the wife from keeping them out of England. The issues that arose upon an appeal from this order were succinctly disposed of by Romer L.J. in the following words:

'It is plain that this court has jurisdiction to order a person in this country to perform an act abroad; but it is said that this court has no jurisdiction to make an order requiring a person resident abroad to do an act there. Notwithstanding the strenuous argument of Mr. Archer it appears to me that his proposition is wholly untenable. The moment a person is properly served under the provisions of Order XI³ that person, so far as the jurisdiction of this court is concerned, is precisely in the same position as a person who is in this country. It is said, however, that even if there was jurisdiction to make the order appealed from it should not have been made as it is not for the benefit of the children. I agree that the benefit of the children is the first consideration of the court. In my opinion the children of British parents who are wards of court should not, in the absence of special circumstances, be permanently resident abroad, and it is plainly right and for the benefit of the children in the present case that they should be brought to this country. Even so it has been contended that this order can never be enforced against Mrs. Liddell if she chooses to disobey it. . . . It is not the habit of this court in considering whether or not it will make an order to contemplate the possibility that it will not be obeyed.'

Jurisdiction of the Court to appoint a guardian. An infant present in England is within the Queen's allegiance. He is entitled to the special protection owed by the Queen as *parens patriae* to infants and entitled to the protection of the royal courts. The English court, therefore, possesses jurisdiction to appoint a guardian or to make an order as to custody, not only where the infant is a British subject⁴ but also where, though an alien, he is domiciled or merely resident in England.⁵ Thus an

Jurisdiction of English court to appoint guardian

¹ *In re Liddell's Settlement Trusts*, [1936] Ch. 365.

² As to the necessity of this, see *In re E. (An infant)*, [1956] Ch. 23.

³ *Supra*, pp. 113 et seqq.

⁴ *In re Willoughby* (1885), L.R. 30 Ch.D. 324; *Hope v. Hope* (1854), 4 De G.M. & G. 328.

⁵ *Johnstone v. Beattie* (1843), 10 Cl. & F. 42; *In re D.*, [1943] Ch. 305. Cp. *In re O'Brien*, [1938] I.R. 323. By the Guardianship (Refugee Children) Act, 1944, the Secretary of State may appoint a guardian of any person who is for the time being in England and who has no parent in England, if he or she came to this

infant German, whose parents were believed to be in an Italian concentration camp, was brought to this country and placed in a hostel. Upon proof that he had been removed from there and was detained by certain relatives, the court ordered that he be placed under the care of a guardian.¹ The fact that an infant possesses property in England does not by itself render the court competent.²

Principle
upon which
jurisdiction
exercised

The exercise of the jurisdiction may be complicated by the fact that a guardian has already been appointed in the country of the domicil and that he, relying upon the principle which submits all questions of status to the *lex domicilii*, claims that the custody of the infant should be given to him. But, as we have seen more than once, the recognition of a particular foreign status does not necessarily mean that effect will be given to all its incidents. The essential fact to appreciate in the present context is that the promotion of the welfare of the infant is the paramount consideration to which everything else yields.³ 'There is but one object which ought to be kept strictly in view and that is the interest of the infant.'⁴ The manner in which the jurisdiction should be exercised lies within the discretion of the judge, and before reaching a decision he should weigh every circumstance that can possibly be regarded as bearing upon the well-being of the infant. It follows that his decision should not lightly be disturbed unless he has clearly acted on some wrong principle or has disregarded material evidence, for he has the advantage, generally denied to an appellate court, of seeing the parties and hearing the cross-examination of the witnesses.⁵ The latitude of his discretion is well illustrated by *McKee v. McKee*.⁶

Husband and wife, American citizens, separated and agreed in writing that neither of them, without the permission of the other, would remove their infant son out of the U.S.A. A year later the husband obtained a decree of divorce from a Californian court and an order awarding him the custody of the infant and confirming the written agreement. Subsequently, the same court, on the applications of both parties, awarded custody to the wife. About five years later the husband took his son to Ontario without the leave or knowledge of his wife. The

country after the end of 1936 in consequence of war or of religious, racial or political persecution, and was under the age of sixteen years at that time.

¹ *In re D.*, [1943] Ch. 305.

² *Brown v. Collins* (1883), 25 Ch.D. 56.

³ *McKee v. McKee*, [1951] 1 All E.R. 942, 948.

⁴ *Stuart v. Bute* (1861), 9 H.L.C. 440, at p. 469, *per* Lord Cranworth.

⁵ *McKee v. McKee*, *supra*, at p. 945.

⁶ *Supra*.

wife thereupon took *habeas corpus* proceedings in Ontario. The trial judge, after a careful review of the circumstances, awarded custody of the infant to the husband, but his decision was reversed by the Supreme Court of Canada.

The Privy Council restored the Ontarian decision. The two charges levelled against the husband, that he had broken the agreement with his wife and had flouted the order of the Californian court, had been adequately considered by the trial judge, and in the opinion of the Board he was justified in concluding that in the light of the other circumstances the interests of the infant would best be served by leaving his custody with the husband undisturbed. The order of the Californian court was a factor of great importance, but it was not decisive.

'Such an order has not the force of a foreign judgment. Comity demands, not its enforcement, but its grave consideration. This distinction, which has long been recognized in the courts of England and Scotland,¹ rests on the peculiar character of the jurisdiction and on the fact that an order providing for the custody of an infant cannot in its nature be final.'²

Having regard to the wide discretion left to the judge, it is not unnatural that the emphasis given to foreign orders and to the claims of the foreign *lex domicilii* has varied considerably in the cases. With *McKee v. McKee* may be ranged *Johnstone v. Beattie*,³ *In re B's Settlement*,⁴ and *Wakeham v. Wakeham*,⁵ in each of which the court showed a somewhat startling tendency to doubt the wisdom of what had been ordered in the domicile. On the other hand, more respect was shown to the views of the domicile in *Di Savini v. Lousada*,⁶ *Nugent v. Vetzera*⁷ and *Monaco v. Monaco*.⁸ The latter case may be contrasted with *McKee v. McKee*.

An Austrian subject, having married an Englishwoman, died in Turkey leaving ten children who were all minors by Austrian law. Their mother having died, one Vetzera was appointed guardian by the Austrian court with a direction that the children should be brought up in the religion of their father, and should be sent as soon as possible to Vienna in order to receive their education in that city. In 1865 five of

Nugent v. Vetzera

¹ *Johnstone v. Beattie* (1843), 10 Cl. & F. 42; *Stuart v. Bute* (1861), 9 H.L.C. 440.

² *McKee v. McKee*, [1951] A.C. 352, 365; [1951] 1 All E.R. 942, 948.

³ *Supra*.

⁴ [1940] Ch. 54.

⁵ [1954] 1 W.L.R. 366.

⁶ (1870) 18 W.R. 425.

⁷ (1866), L.R. 2 Eq. 704.

⁸ (1937), 157 L.T. 231.

the children were being educated at various schools in England, and Vetzera decided that three of these should be forthwith removed to Vienna. Their eldest sister, who had married an Englishman, being opposed to the plan, made the children wards of court and obtained an order by which she and two other English persons were appointed guardians. Vetzera appealed against this order and moved that the guardians be ordered to deliver the infants into his custody.

Opposition to the motion was based on the principle that the court must always be solely guided by what is most beneficial to the infants.

'As to completing their education at Vienna,' said counsel, 'what possible benefit can result by removing them from this country, where all their friends and connexions are, and where they are being brought up under the care of a married sister, who, from her position in society, is able to give them the best possible education and associations, and sending them to a city where, even if a good education can be obtained, they have not a single relation or friend? We do not wish to remove Vetzera from his guardianship, nor do we suggest a single word against him. All we say is that he is not an English guardian, and is unable, from his position, to bring these children up in accordance with the course of education that they have hitherto enjoyed.'

This argument, however, found no favour with Page-Wood V.-C. That learned judge refused even to consider the question whether the interests of the infants would be better served by an English or by an Austrian education.¹ While observing that he was not propounding any abdication of his right to appoint guardians, he conceived that he had no right to interfere with the discretion of the guardian appointed by the foreign court, and he made an order giving Vetzera the exclusive right to the custody and control of the children. At the same time he refused to discharge the order appointing English guardians, on the ground that the children, if present at any time in England, might require the protection of persons within the jurisdiction.

Foreign guardians not confirmed by the English court. If a foreign guardian has not been confirmed in his office by the English court the question arises whether he is entitled to exercise in England those rights over the person and property of his ward that are recognized by English internal law. It is clear in the first place that, whether confirmed or not, his powers are limited to those recognized by English internal

¹ His attitude would presumably have been different had the infants been British subjects; *Dawson v. Jay* (1854), 3 De G.M. & G. 764.

law.¹ This rule is in sharp contrast with the practice adopted on the Continent, where it is admitted in general that a tutor appointed under the personal law of the infant enjoys the same rights over his ward's movable property in other countries as he possesses in the country of his appointment. The problem is, then, whether a foreign guardian is justified if he acts in England within the limits of English internal law. The answer would appear to be that nowadays he occupies in effect the same position as an English guardian. What he does within the limits of English internal law will be recognized as validly done provided that his authority has not been challenged; but if his position or his authority is challenged, then, as in the case of an English guardian, it lies within the discretion of the court whether he shall be replaced by another person or whether his acts or proposed acts shall be approved. Perhaps the only difference in this respect between a foreign and an English guardian is that the court would be more ready to displace the former than the latter.

The cases already discussed show that whether the foreign guardian shall be allowed to exert his personal authority, as, for example, by removing the ward from England, is conditioned solely by what the court considers is most calculated to promote the welfare of the infant. The position is the same with regard to proprietary rights. English practice has shown a tendency to recognize the right of a foreign guardian to claim movable property in England.² Again, however, if his right is challenged it is at the discretion of the court whether, having regard to the interests of the ward, the property shall be delivered to the guardian or to some other person.³ The question generally arises where money is due to a foreign infant under an English settlement, will or intestacy. Where the money has not been paid into court, it has been said that the trustees are legally discharged if they make payment to the foreign guardian and take his receipt.⁴ Where the money is in court, then the court is entitled, but not compelled, to order

Authority
of foreign
guardian
over ward's
property

¹ *Johnstone v. Beattie* (1843), 10 Cl. & F. 43, 114.

² *Mackie v. Darling* (1871), L.R. 12 Eq. 319; *In re Crichton's Trust* (1855), 24 L.T. (O.S.) 267; *In re Browne's Trust* (1865), 12 L.T. 488.

³ *In re Chatard's Settlement*, [1899] 1 Ch. 712; *Ex parte Watkins* (1752), 2 Ves. Sen. 470; *In re Hellmann's Will* (1866), L.R. 2 Eq. 363. Cp. *Dharmal v. Holmpatrick*, [1935] I.R. 760: *A*, domiciled in Indore, not entitled as of right to Irish Sweep winnings of his daughter, aged 7, though by Indore law he could give a good discharge.

⁴ *In re Chatard's Settlement*, *supra*, at p. 716, Kekewich J.

payment to the guardian, and whether it does so or not depends upon whether it is satisfied that the property will be properly administered for the infant's benefit.

II. LUNACY

Circumstances in which English court has lunacy jurisdiction Although the *lex domicilii* is as a general rule omnipotent in questions of status, and although lunacy undoubtedly raises such a question, yet it is clear that the mere domicil, or even nationality, of an insane person is not so material as the place where he happens to be at the moment, since the main purposes of lunacy jurisdiction are the welfare of the lunatic himself and the protection of his neighbours. The certification of a person as a lunatic and his detention in safe custody are clearly matters that must be governed exclusively by the law of the place where he happens to be. The rule is, therefore, that an English court possesses lunacy jurisdiction over any person, whether an alien or not, who is actually present in England, and that it is competent to appoint a committee to protect the person and property of the lunatic.¹ Thus in one case:

A domiciled American woman showed symptoms of insanity upon the voyage from America, and again after her arrival in England. It was held that the court had jurisdiction to direct an inquiry into her state of mind, despite the fact that, except for personal belongings, she had no property of any kind in this country.²

There are two decisions which hold that the jurisdiction exists even in respect of an absent person, provided that there is property in England which requires protection.³ British nationality or domicil would not in itself appear to justify an exercise of jurisdiction.

Personal authority of foreign curator With regard to the powers of a foreign curator whose appointment has not been confirmed in England, it is clear that he can exercise no control in this country over the lunatic personally.⁴ His proper course is to institute lunacy proceedings in England. In this case the court, without going so far as to appoint him committee, may in a proper case direct that the lunatic shall be handed over to him for removal to the foreign place.⁵

¹ *In re Houston* (1826), 1 Russ. 312; *In re Bariatinski* (1843), 1 Ph. 375; *In re Burbidge*, [1902] 1 Ch. 426.

² *In re Burbidge*, *supra*.

³ *Ex parte Southcote* (1751), 2 Ves. Sen. 401; *In re Scott* (1874), 22 W.R. 748.

⁴ *In re Houston* (1826), 1 Russ. 312.

⁵ *In re Sottomaio* (1874), L.R. 9 Ch. 677.

With regard to the foreign curator's power over English property, the first clear rule is that no such power exists if an English committee has already been appointed.¹ Where there is no such committee the rule has now become established that a foreign curator is entitled to demand, and to give valid receipts for, property belonging to the lunatic which is held by persons in England.² This principle was finally laid down by the Court of Appeal in the leading case of *Didisheim v. London & Westminster Bank*,³ where the facts were as follows:

Proprietary
authority
of foreign
curator

A lady, domiciled and resident in Belgium, had securities of great value deposited with the defendant Bank in London. She became insane in fact, though without being so found judicially, and Didisheim was appointed her provisional administrator by the Belgian court. Didisheim, having applied to the Bank without success for the securities, brought an action for their recovery.

North J. gave judgment for the defendants on the ground that, though there were many cases in which the courts had so far recognized the status of a foreign guardian as to order the delivery of English property to him, yet this was only possible on the authorities⁴ where the lunatic had been so found abroad and where his property had been vested in the curator by the foreign court. The Court of Appeal, however, in reversing this decision, held that Didisheim was entitled to call for the securities and to give the bank a good discharge.

'On general principles of private international law, the courts of this country are bound to recognize the authority conferred on him by the Belgian courts, unless lunacy proceedings in this country prevent them from doing so.'⁵

The court, however, ordered Didisheim to pay all the costs of the action, since the Bank was justified in not complying with his demands until he had established his title by a successful action in the High Court. At the present day, however, an English debtor in like circumstances is not justified in insisting upon the protection of an order of the court. *Didisheim's Case* has definitely established the right of a foreign curator to demand property. If, therefore, an English debtor forces an

¹ *In re R.S.A.*, [1901] 2 K.B. 32.

² *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15; *Thiery v. Chalmers Guthrie & Co.*, [1900] 1 Ch. 80; *In re De Linden*, [1897] 1 Ch. 453; *Scott v. Bentley* (1855), 1 K. & J. 281.

³ [1900] 2 Ch. 15.

⁴ *In re Barlow's Will* (1887), 36 Ch.D. 287.

⁵ *Per curiam*, p. 51.

action, he acts with an unreasonable excess of caution and will have to pay his own costs.¹

One limitation on the decision in *Didisheim's Case* must be noticed. The owner of the property was an alien domiciled abroad over whom the court had no jurisdiction personally. The same duty to recognize the status of the foreign curator, therefore, does not arise where the lunatic is an Englishman temporarily abroad.²

Quite apart from the general rule laid down in *Didisheim's Case*, it is provided by the Lunacy Act, 1890,³ that where any stock is standing in the name of a person residing out of the jurisdiction, the judge in lunacy, if satisfied that the person has been declared a lunatic and that his personal estate has been vested in a foreign curator or similar functionary, may order that the stock shall be transferred and the dividend paid to the curator.

When a lunatic has property of small amount in England, Scotland or Ireland, statutory provisions have been made whereby a person appointed to act in one country may administer personal property in the other without being compelled to take legal proceedings there.⁴

A question that does not appear to have arisen is the effect upon a transaction containing a foreign element of the lunacy of one of the parties. If a transaction is entered into in England between an Englishman and a domiciled foreigner who is in fact insane, is its legal effect determined by the *lex domicilii* of the lunatic or by English law? It would seem that here the *lex domicilii* can advance no paramount claim, and that the matter must be governed by the law with which the transaction is most closely connected.

¹ *Pélégryn v. Coutts & Co.*, [1915] 1 Ch. 696.

² *In re Garnier* (1872), L.R. 13 Eq. 532; *New York Security Co. v. Keyser*, [1901] 1 Ch. 666.

³ S. 134.

⁴ Lunacy Act, 1890, s. 131.

Transfer of
stock under
Lunacy
Act, s. 134

What law
governs
trans-
actions of
lunatic?

PART V

THE LAW OF PROPERTY

**CHAPTER XIV. THE DISTINCTION BETWEEN
MOVABLES AND IMMOVABLES**

CHAPTER XV. THE LAW OF MOVABLES

CHAPTER XVI. THE LAW OF IMMOVABLES

CHAPTER XIV

THE DISTINCTION BETWEEN MOVABLES AND IMMOVABLES

ENGLISH private international law, in order to arrive at a common basis upon which to determine questions involving a foreign element, classifies the subject-matter of ownership into movables and immovables, and thus adopts a distinction that is accepted in other legal systems.¹ The first task of the court in a conflict of laws case when required to decide some question of a proprietary or possessory nature is to decide whether the *res litigiosa* is a movable or an immovable. Upon this preliminary decision depends the legal system that will be applicable to the case. Rights over immovables are determined by the *lex situs*; rights over movables are not necessarily governed by that law. In the sphere of private international law, then, the Anglo-Saxon distinction between realty and personalty is abandoned, even though the case concerns a country in the British Commonwealth where it is recognized in the sphere of domestic law. The importance of not confusing the domestic distinction between realty and personalty with the private international law distinction between movables and immovables can scarcely be exaggerated. The one is not *in pari materia* with the other. The one cuts across the other in the sense that personalty includes both movables and immovables. Thus 'realty' is not synonymous either with 'land' or with 'immovables', for though a life tenant, for instance, holds an interest in realty, a leaseholder holds an interest in personalty. For the purposes of private international law, however, a lease creates an interest in an immovable and is subject to the *lex situs*.²

Subject-matter of ownership classified as movable or immovable not as realty or personalty

The question whether the subject-matter of ownership is a movable or an immovable generally presents no difficulty. It is common ground that interests in land, whether classified according to their nature, such as legal estates and equitable interests; or limited in duration, such as fees simple, entails and terms of years; or independent of the right to possession of the land, such as easements, profits and rentcharges, are

Lex situs decides whether subject-matter is movable or immovable

¹ *In re Hoyles*, [1911] 1 Ch. 179, at p. 185.

² *Freke v. Carbery* (1873), L.R. 16 Eq. 461.

interests in an immovable. A more complex problem arises in those cases where a right over what is physically a movable is regarded by a particular legal system as a right over an immovable. For instance, the owner of such obvious chattels as title-deeds, fixtures, fish in a pond and the key of a house is regarded by English internal law as having an interest in land. Again, it seems obvious at first sight that a building erected for the purposes of an exhibition, and which cannot be removed without losing its identity, must be in the same category as normal buildings, yet in some of the American States¹ and in Germany² its owner is deemed to hold an interest in a movable. If, therefore, the subject-matter of ownership is regarded as an immovable by one system of law but as a movable by another, to which law is the decision left? The answer given by English law and by most foreign legal systems is the *lex situs*. If the *lex situs* attributes the quality of movability or of immovability to the object in question, the English court which is seised of the matter must proceed on that basis.³

Immovables sometimes regarded as movables

‘The question in all these cases’, said Story, ‘is not so much what are or ought to be deemed, *ex sua natura*, movables or not, as what are deemed so by the law of the place where they are situated. If they are there deemed part of the land, . . . they must be so treated in every place in which any controversy shall arise respecting their nature and character.’⁴

Mortgages Thus it has been held that the right vested in a mortgagee of English land must be regarded as an interest in an immovable, notwithstanding that it is classified by English domestic law as personalty and that the debt, not the charge, is the principal characteristic of the transaction.⁵

Scottish heritable bonds

The question whether a security granted in respect of land is to be regarded as conferring a right over an immovable or not, also occurs in the case of a Scottish heritable bond, i.e. a bond for a sum of money to which is joined, for the creditor’s further security, a conveyance of land. The nature of such a bond falls to be determined by Scottish law as being the *lex situs*, and, where the personal undertaking and the conveyance are contained in the same instrument, the right of the creditor

¹ Cook, *op. cit.*, pp. 306 et seqq.

² Wolff, *op. cit.*, p. 502.

³ *Johnstone v. Baker* (1817), 4 Madd. Rep. 474 n.; Westlake, s. 160, approved *In re Hoyles*, [1910] 2 Ch. at p. 341; [1911] 1 Ch. 179; Lainé, *Droit Int. Privé*, ii. 262; for U.S.A. see *Chapman v. Robertson*, 6 Paige (N.Y.) 630; Story, s. 447.

⁴ S. 447.

⁵ *In re Hoyles*, [1911] 1 Ch. 179.

has been held to be one over immovables.¹ This rule, however, has been partly abrogated by the Titles to Land Consolidation (Scotland) Act, 1868,² which provides that, so far as concerns *the right of succession to a creditor*, his heritable bonds shall be deemed to be part of his movable estate. Again, if a debt is secured to an English creditor both by a personal undertaking contained in a separate instrument and also by a heritable bond, the creditor is deemed to have a right in a movable, since the mere existence of the collateral security over the land does not alter the fact that the debt is a *chose in action*.³

The character of annuities and other periodical payments depends upon whether they issue out of, or are charged upon, land.⁴ An annuity in the strict sense represents a right to a movable, but a rent charged upon land is an interest in an immovable.⁵

A further and important illustration is afforded by *In re Berchtold*.⁶ This case turned upon the English doctrine of conversion, namely, that:

Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which their conversion is directed.⁷

What this equitable doctrine means in effect is that where there is such a direction the realty is treated as personalty for certain purposes, or in the reverse case that the personalty is treated as realty for certain purposes.⁸ If, for instance, land is conveyed to trustees upon trust for sale and to pay the proceeds to *A*, and *A* dies before the actual sale, a bequest by him of all his personalty will include the money eventually arising from the sale. This, of course, does not alter the fact that until sold the land is still an immovable. This becomes material if the beneficiary under the trust dies domiciled in a foreign country before the conversion has actually been effected. *In re Berchtold* is a case in point.

A died intestate, domiciled in Hungary, being entitled to a freehold

¹ *Johnstone v. Baker* (1817), Madd. 474 n.; *Ferningham v. Herbert* (1829),

4 Russ. 388; *Allen v. Anderson* (1846), 5 Hare 163.

² 31 & 32 Vict. c. 101, s. 117.

³ *Buckleuch v. Hoare* (1819), 4 Madd. 467.

⁴ Story, s. 447, n. 2.

⁵ *Chatfield v. Berchtold* (1872), L.R. 7 Ch. 192.

⁶ [1923] 1 Ch. 192.

⁷ *Fletcher v. Ashburner* (1779), 1 Bro. C.C. 497; Snell, *Equity* (22nd ed.), p. 194. Cp. the analogous French doctrine, 'convention de réalisation' and 'convention d'ameublement', Burge IV, pt. i, pp. 698 et seqq.

⁸ Cook, op. cit., p. 256.

interest in English land which was subject to a trust for sale but which had not been sold. The English rule for the choice of law is that intestate succession is governed by the *lex situs* in the case of immovables, but by the *lex domicilii* in the case of movables. It was, therefore, vital to decide whether the freehold interest, despite the doctrine of conversion, was still to be regarded as an interest in an immovable.

It was argued with some plausibility that by reason of the trust for sale the land was already money in the eyes of equity, that money is a movable, and that therefore the devolution was governed by Hungarian law.

The fallacy of this argument was demonstrated by Russell J. The primary question before the court was whether the subject-matter in which the deceased was interested was immovable. This had nothing to do with a subsequent question that might arise under the doctrine of conversion, namely, whether realty was to be treated as personalty, or vice versa. It was held that the unsold land was an immovable, notwithstanding the binding direction for its conversion into money, and that therefore the proper law to govern its devolution on intestacy was the *lex situs*.

As an Irish judge said in a case where land in Ireland, subject to an existing trust for sale, had been disposed of by the will of a domiciled Scotsman:

‘It is still immovable property in fact and the disposition of it is a disposition of immovable property and not of something else, namely, the money by which, if sold, it would be represented, but which before the sale does not in fact exist.’¹

In re Cutcliffe's Will These two decisions were distinguished by Morton J. in a later case where the distinction between realty and personalty, and therefore the doctrine of conversion, were not strictly relevant.²

English land which was subject to an English settlement had been sold under the Settled Land Act, 1882, and the proceeds had been invested in English debenture stock. The beneficiary under the settlement died intestate in 1897 domiciled in Ontario.

So far it seems obvious that the stock was in fact a movable and that therefore under the relevant doctrine of private international law its devolution was governed by the *lex domicilii* of

¹ *Murray v. Champenowne*, [1901] 2 I.R. 232.

² *In re Cutcliffe's Will Trusts*, [1940] Ch. 565.

the deceased. The Settled Land Act, 1882, however, provided that:

'Capital money arising under this Act while remaining uninvested and securities on which an investment of any such capital money shall be made, shall, for all purposes of disposition, transmission and devolution, be considered as land.'¹

In order to choose the governing law the primary question was whether the stock was a movable or an immovable. It was held that it was an immovable and subject as such to the English law of devolution. The decision has been attacked on the ground that the domestic doctrine of conversion was erroneously applied at the stage when the case was being considered internationally.² But this is to misinterpret the *ratio decidendi*. How could the decision have been otherwise? The stock was physically situated in England. English law, therefore, had to determine whether it was to be treated as a movable or an immovable. An English statute peremptorily demanded that for all purposes it should be regarded as land.

Of course, once the choice of law has been made, there may come a stage at which the distinction between realty and personality becomes relevant. This occurs where the choice falls on a law that recognizes the distinction. The chosen law now has control of the case and it must be allowed to operate in its own way. In *Berchtold's Case*, for instance, the effect of deciding that the intestate died entitled to land was to let in English law as the *lex situs*, with the result that the land, being regarded as money under the domestic doctrine of conversion, devolved as personalty according to the rules of English internal law. Another example is afforded by the Wills Act, 1861, commonly called Lord Kingsdown's Act,³ which provides that the will of a British subject shall be formally valid as regards *personalty*, provided that it is valid according to the law of the country where it is made, although not valid by the law of the testator's domicile. This is an exception to the general rule that the *lex domicilii* of the testator governs the validity of a will of movables with regard to form. If, therefore, a British subject, domiciled in England, who is entitled to English land held on trust for sale but not yet sold, disposes of his interest by a will which is valid by the law of the country where it is made but invalid by

Stage at which distinction between realty and personality is material

¹ S. 22 (5); see now Settled Land Act, 1925, s. 75 (5).

² By Falconbridge in 18 *Can. Bar. Review*, pp. 568-73.

³ *Infra*, p. 533.

English law, the disposition is effective.¹ The subject-matter of his interest is no doubt immovable, but that does not affect the real question, which is whether it is personalty within the meaning of the English statute. Immovables subject to a trust for sale are deemed by English law to be money, i.e. personalty, so that they are caught by a statute which refers specifically to a disposition of personalty. The reverse position arose in another case:²

Settled freehold estates in English land had been sold under the Settled Land Act and part of the proceeds had been invested. Therefore under the Settled Land Act these investments were to be considered as land. The beneficiary in whom they had become vested, subject to certain charges, was a British subject who died domiciled in England. He disposed of them by a will which was formally valid by the *lex loci actus*, but invalid by English law.

If, therefore, the investments were to be regarded as personalty, the will was formally valid by virtue of Lord Kingsdown's Act, but if they were to be considered as land, the will was invalid, since it had not conformed to English law, the *lex situs*. The Court of Appeal had no hesitation in holding that investments which in the eye of the law were land could not be personalty for the purposes of Lord Kingsdown's Act.

The distinction between *choses in possession* and *choses*

The subject-matter of ownership, if not immovable, is properly divisible into *choses in possession*, i.e. tangible physical objects, and *choses in action*, such as debts, patents, copyright, goodwill, stocks and shares. The classification of movables usually preferred, however, by private international lawyers is into tangible things and intangible things.³ This is not only a linguistic solecism, since it is scarcely possible to move a thing that cannot be touched, but it provokes an unfortunate tendency to ascribe to a disembodied thing, such as a debt, the physical attributes of a corporeal object as, for instance, a definite *situs*. Although Lord Halsbury once remarked that he was 'wholly unable to see that goodwill itself is susceptible of having any local situation',⁴ it is of course necessary for certain purposes, such as jurisdiction or probate, to assign a *situs* not

¹ *In re Lyne's Settlement Trusts*, [1919] 1 Ch. 80.

² *In re Cartwright*, [1939] Ch. 90.

³ For a criticism of the distinction see Cook, *Legal and Logical Bases of Conflict of Laws*, pp. 284 et seqq.

⁴ *Inland Revenue Commissioners v. Muller & Co.'s Margarine Ltd.*, [1901] A.C. 217, at p. 240.

only to goodwill, but to *choses in action* generally.¹ This is not without its dangers. Since the *situs* principle has furnished a simple and effective rule for questions relating to a physical thing, the natural inclination is to extend it to the abstract and to regard it as the general determinant of rules for the choice of law concerning *choses in action*. This is a false analogy. Moreover, it frequently leads to forcing a rule, eminently adapted to one set of circumstances, to fit circumstances for which it is entirely inappropriate. It is reasonably clear that the proper law to govern goodwill or a debt depends upon quite different considerations from those that are relevant to a physical thing. An English merchant, for instance, having sold goods on credit to a foreigner who has places of business in France, Switzerland and Italy, assigns the debt to a Dutchman. If the right of the assignee to sue the debtor is disputed, is the question to be governed by the *lex situs*? If so, what is the *situs*? The traditional answer, that it is the country where the debtor resides, is calculated to increase rather than to dispel uncertainty in commercial transactions. Obviously some different approach to the problem is required than that which has proved useful in another field. Although, therefore, the initiated no doubt know what they mean by their division of movables into tangible and intangible things, it seems to be more seemly and less harmful to adopt the distinction between *choses in possession* and *choses in action*.

¹ Goodwill is deemed to be situated in each country in which the business to which it is attached is carried on; *Reuter (R.F.) Co. Ltd. v. Muhlen*, [1950] Ch. 50, at p. 95, *per* Romer L.J.

CHAPTER XV

THE LAW OF MOVABLES

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A. PARTICULAR ASSIGNMENTS

I. TRANSFER OF *CHOSSES IN POSSESSION*¹

(a) *The various theories*

What law governs particular transfers of *choses in possession*? OUR next task is to ascertain the legal system according to which the various problems that may arise from an assignment of movables must be determined. We are not concerned here with what are usually called general assignments, under which, on the occasion of marriage, death and bankruptcy, the entirety of a person's property may pass to another. Our inquiry is confined to particular assignments *inter vivos* of isolated or individual movables, of which the commonest examples are sales, gifts, mortgages and pledges. Further, the present discussion is limited to *choses in possession*.

This is perhaps the most intractable topic in English private international law, for the few relevant authorities are mostly antiquated and they do not reveal with any certainty what principles govern the subject as a whole. It is too often assumed, however, that all problems must be referred to one single law.

¹ On this subject see especially, Lalive, *The Transfer of Chattels in the Conflict of Laws*; and Falconbridge, *Conflict of Laws* (2nd ed.), pp. 442 et seqq.

In the course of time diverse views upon what this is have been advanced. The *lex situs*, the *lex domicilii* of the parties or of the transferor, the *lex loci actus*, the proper law of the transfer—each of these has had its advocates. The assumption, however, is untenable. It represents an oversimplification of the position, for it is based on the fallacy that the possible questions arising out of a transfer of movables all fall into the same category and are all of the same juridical nature. This is not so. Suppose, for instance, the following facts:

All ques-
tions not
necessarily
subject to
one law

A, resident and domiciled in England, sells goods lying in a Barcelona warehouse to *B*, a Dutch merchant. He transmits the bill of exchange and the bill of lading to *B* to secure acceptance. *B* fails to accept the bill of exchange but takes the bill of lading to Antwerp and transfers it there to *C*, a Belgian merchant. Meanwhile, the goods have been shipped from Barcelona *en route* to Holland. The ship is wrecked off the coast of France, but the goods are salvaged and sold by the judicial authorities in Bordeaux to *D*.

A number of questions, some contractual others proprietary, differing fundamentally in character, may arise from these facts, and it does not require much acumen to appreciate that each one of these cannot satisfactorily be submitted to one system of law. Litigation may occur between *A* and *B* as to the formal or essential validity of the original transfer. *A* may claim as against *B* that he is entitled to stop the goods *in transitu*. *C* may interplead and claim a derivative title from *B* which he alleges renders stoppage unlawful. *D* may claim that the effect of the judicial sale in France has been to divest all previous owners, original as well as derivative, of their former titles. If it is true to say that questions arising out of the transfer and acquisition of property in corporeal movables are determinable by one single law, what is that law in the instant case? Is Spanish law, which happened to be the *lex situs* at the time of the original transfer, to determine *inter alia* the essential validity of the transaction between *A* and *B*, the effect of a failure by a Dutch buyer to accept a bill of exchange received by him from an English seller, and the title of a Frenchman who buys goods in France publicly sold by a French judicial authority? Further, the *lex situs* has not remained constant. Is it Spanish law for some questions, French law for others? If so, how are the questions to be classified for this purpose? If the *lex situs* is disenthroned as the one governing system and replaced by the *lex loci actus*, or by the *lex actus*, i.e. the law with which the

original transfer is most closely connected, or by the *lex domicilii* of any of the possible contestants, the mind recoils from the strange conclusions that might be reached by a court. Maugham J. once said *obiter*: 'I do not think that anybody can doubt that with regard to the transfer of goods the law applicable must be the law of the country where the movable is situate.'¹ It is submitted with respect that this rule, though undoubtedly correct in general, is not without its exceptions. The truth is that the search for the proper law to govern questions arising out of the transfer of corporeal movables will produce nothing but confusion and obscurity, unless certain elementary distinctions are made. Before suggesting how this should be done, it is proposed to consider the various theories that have been advanced.

Four
possible
systems

In choosing the proper law to govern the transfer of movable objects, arguments may be advanced in favour of the *lex domicilii*, the *lex situs*, the *lex loci actus*, or the proper law of the transfer. It will be well to consider the relative merits of these legal systems before attempting a final statement of the law.

(i) The *lex domicilii*

Historically the starting-point is the maxim *mobilia sequuntur personam*, or, as it is stated in reference to debts, *mobilia ossibus inhaerent*. 'Personal property', some English writers have said, 'has no locality.' The earlier Continental authorities, taking their stand upon these maxims, affirmed with one accord that rights over movables were governed by the law of the owner's domicil.² It was said that movables must be considered in law to be situated in the domicil, for, since they might be moved from place to place at will, it was a matter of chance where they might happen to be at any given time. Dumoulin said that an artificial situation must be ascribed to movables since they had none that was fixed. Story justified the doctrine on the ground of 'its simplicity, its convenience, and its enlarged policy',³ and concluded with the statement that it had been 'constantly maintained both in England and America, with unbroken confidence and general unanimity'.⁴

English
dicta in
favour of
lex domicilii

It is true that support for the doctrine is to be found in judicial dicta. Thus, in a frequently quoted passage from *Sill*

¹ *In re Anziani*, [1930] 1 Ch. 407, 420. See also *Bank voor Handel en Scheepvaart N.V. v. Slatford*, [1953] 1 Q.B. 248, at p. 257, *per* Devlin J.: 'There is little doubt that it is the *lex situs* which as a general rule governs the transfer of movables when effected contractually.'

² Bar, p. 488, note 1, where the authorities are collected; Story, s. 376.

³ S. 379.

⁴ S. 380.

v. *Worswick*¹ Lord Loughborough, when dealing with a case of a general assignment, said:

'It is a clear proposition, not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality; the meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or by the act of the party, it follows the law of the person.'

Again, Bayley B., in a later case, said:²

'It is clear from the authority of *Bruce v. Bruce*—and the case of *Somerville v. Somerville*—that the rule is that personal property follows the person, and it is not in any respect to be regulated by the *situs*; and if in any instance the *situs* has been adopted as the rule by which the property is to be governed, and the *lex loci rei sitae* resorted to, it has been improperly done.'

Despite the antiquity of the doctrine and the support which it even now sometimes receives, it is submitted that it is untenable and unreasonable in all but the simplest cases. Several reasons may be advanced against its soundness.

Objections
to *lex*
domicilii

In the first place it would prejudice trade. It would mean, carried to its logical conclusion, that the delivery of goods in England by a domiciled foreigner under a legally binding contract would be held void in opposition to English law if some ground of invalidity existed under the law of the owner's domicile. Such a result would be contrary to reason and justice, for it is elementary that a foreigner who brings goods to this country and barter them here must expect the transaction to be governed by the local law.

Unjust to
persons
contracting
with im-
plied refer-
ence to
lex situs

Again, the manner in which the doctrine would injuriously affect innocent third parties may be illustrated from a hypothetical case.³

Prejudicial
to third
parties

A, a domiciled Englishman, by a transaction which is valid by English law but void by the law of Illinois, executes a bill of sale in favour of *X*, another domiciled Englishman, over goods that are situated in Chicago, Illinois. Later, *Y*, also domiciled in England, causes a writ of attachment to be levied on the goods in Chicago in respect of a debt due to him from *A*. The attachment suit proceeds to judgment and the goods are sold in satisfaction of *Y*'s debt.

¹ (1791), 1 H.Bl. 690.

² *In re Ewin* (1830), 1 Cr. & J. 151, 156.

³ Adapted from *Green v. Van Buskirk* (1886), 5 Wall. 307, in the Supreme Court of the United States; Lorenzen, p. 582.

The result of holding in such a case that the original transaction conferred a valid and prior title to the goods upon *X*, since it conformed to the law of the common domicil of *A* and *X*, would be to impose liability in trover upon the sheriff and the officer who conducted the sale in Chicago. Yet it is obvious that though the sheriff must be presumed to know the law of the place where the goods are situate, he cannot be expected to investigate the *lex domicilii* of their owner.

Again, whose domicil is decisive? Suppose, for instance, that:

Impossible
where
several
claimants
with
different
domicils

The question is whether goods stored in Antwerp belong to a domiciled Englishman or to a domiciled Frenchman.

In such a case no decision is possible on the basis of the *lex domicilii* if the laws of France and of England differ, for there is no guide as to which of these laws shall be chosen. If the *lex domicilii* of the plaintiff is chosen on the ground that the question of his title has been raised, there is a *petitio principii*, since the sole issue is whether he possesses a title.¹ The result is the same if the *lex domicilii* of the defendant is chosen. Moreover, if the decisive factor is the domicil of one of the parties, the governing law would vary according to which of them began proceedings.²

Reason
why early
writers
favour *lex*
domicilii

The explanation of the adoption by the earlier writers and judges of what is an impracticable principle is that, finding it established as the governing rule for general assignments, they unthinkingly extended it to the quite different case of particular assignments. On the occasion, for instance, of marriage or death, two events which may cause a general transfer of proprietary rights, it is essential to have some one system of law, the matrimonial domicil in the first case and the domicil of the deceased in the second, which will regulate the disposition of the property; and, in fact, it has been said by the Privy Council that the maxim *mobilia sequuntur personam* means, not that movables are deemed to be situated where their owner is domiciled, but merely that their devolution on his death is governed by his personal law.³ The *lex situs* is an impossible choice in such cases, for otherwise it might happen that

¹ Wharton, s. 308.

² Ibid. Wolff suggests that the *lex domicilii* principle merely means that if *A* is the owner of a thing, a transfer by him must conform to the law of his domicil; *Private International Law*, p. 510, note 1.

³ *Alberta (Provincial Treasurer) v. Kerr*, [1933] A.C. 710, 721.

'a different law of inheritance or of matrimonial rights might apply to each single movable article that belonged to the estate'.¹ The older Continental jurists, in their insistence upon the pre-eminence of the personal law in relation to property, were generally dealing with the subject of inheritance, and it was but seldom that they considered assignments of isolated things.²

An alternative choice to the *lex domicilii* is the *lex situs*. This (ii) The *lex situs* has obvious virtues. Where claimants have different domicils or where they rely upon transactions in different countries, the *lex situs* has the great advantage of being a single and exclusive system that, possessing effective control over the subject-matter of the suit, can act as an independent arbiter of conflicting claims. Moreover, its right of control satisfies the expectations of the reasonable man, for a party to a transfer naturally concludes that the transaction will be subject to the law of the country in which the subject-matter is at present situated. If a movable which is vested in *A* as the result of a transaction with *B* governed by English law is taken by *B* to France and there sold to *C* in circumstances which, by French law but not by English law, confer a valid title on *C*, it would be idle to rule that the mutual rights of *A* and *C* are to be governed by English law. The inescapable fact is that the *res litigiosa* is under the control of the French authorities.

Nevertheless, it is going too far to say that every type of question must be submitted to the law of the *situs* and to that law alone. If, for example, goods deposited temporarily in a Naples warehouse are sold by their owner, a London merchant, to another London merchant by a contract effected in England, there seems no obvious reason why the right of the seller to enforce his lien in the event of non-payment should be governed by Italian law.

Again, as can be seen from the example suggested on page 437, cases may arise where the *situs* of the goods changes during the course of events leading to litigation. If this is so, the difficulty will be to identify the particular *lex situs* that must govern.³

There is little to be said in favour of the *lex loci actus*. Here, (iii) The *lex loci actus* as in other departments of law, the mere fact that a transaction is completed in a particular place is no adequate reason for admitting the control of the local law. If, for instance, an

¹ Bar, pp. 489-90.

² Pillet, i. 695.

³ 22 *B.Y.B.I.L.* 233.

Englishman executes a document in Edinburgh granting a lien over his furniture in London to another Englishman, it is unthinkable that this slight and perhaps accidental connexion with Scotland should require the possessory rights of the parties to be determined by Scots law. Yet, curiously enough, there are at least two decisions, each, however, dealing with negotiable instruments, which contain strong dicta in favour of the *lex loci actus*. Thus in *Alcock v. Smith*, Romer J. said:

‘Generally, the rights of transferor and transferee, on a transfer in one country of a document of title to a debt or to an interest in personal property, are governed by the law of the country where the transfer takes place, although the debt may be due from persons living in, or the personal property may be situate in, a foreign country.’¹

On appeal, Kay L.J. in terms said the same thing, but it seems clear from the illustrations he gives that he had in mind a case where the *lex loci actus* and the *lex situs* coincided. He said:

‘As to personal chattels, it is settled that the validity of a transfer depends, not upon the law of the domicile of the owner, but upon the law of the country in which the transfer takes place. Our own law of distress and market overt is illustrative of this. . . . The goods of a foreigner sold here in market overt by one who had no title to them could not be recovered from the purchaser.’²

Since the *locus actus* and the *locus situs* are necessarily the same in the transfer of a negotiable instrument, it is probable that in these cases the judges, despite their reference to the *lex loci actus*, were in fact speaking in terms of the *lex situs*.³

(iv) The proper law of the transfer The last law that may be chosen to govern questions arising out of a transfer of movables is the law of the country with which the transfer has the most real connexion, or, more shortly, the proper law of the transfer, equivalent to the proper law of a contract.

Its ascertainment will in most cases cause no difficulty, as for instance where the *lex loci actus* and the *lex situs* are identical or where two English business men meet in Paris and complete a transfer there of goods situated in England. But a more complex problem may arise, as where *A*, resident and domiciled in England; sells goods lying in a Naples warehouse to *B*, who is resident and domiciled in Holland. Without more facts it is

¹ [1892] 1 Ch. 238, 255.

² *Ibid.*, at p. 267. See also *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K.B. 677, at pp. 683, 685.

³ *Lalive*, *op. cit.*, p. 79.

scarcely possible to say what the *lex actus* would be in such a case. Before it could reach a decision, the court would require to know, *inter alia*: Where was the transfer effected? If reduced to writing, was it drafted in terms peculiar to English, Dutch or Spanish law? Were the goods only temporarily in Italy? The danger, however, to avoid is the assumption that the *lex situs* always constitutes the proper law.

It would seem that of the four laws proposed the choice lies between the *lex situs* and the proper law of the transfer. Nevertheless, it cannot be said that either of them governs all cases to the exclusion of the other, or that where they clash there is one which invariably must be preferred. Which is the determinant depends upon whether the question to be decided arises between the parties to a particular transaction or between one of them and a third party. An attempt will now be made to state the modern law on the basis of this distinction.

Choice lies between *lex situs* and *lex actus*, but neither invariably governs

(b) The modern law

1. Questions confined to the parties to a particular transfer.

Questions arising between the parties themselves may include a variety of matters, such as whether the transfer is void for incapacity, whether it is formally or essentially void, whether it is voidable for misrepresentation or other cause, whether the property in the movables has passed to the transferee, whether the transferor has a lien on the goods or a right to stop them *in transitu*, and what is the nature of the interest created by the transfer. Some of these questions are of a contractual, others of a proprietary, character.

Contractual and proprietary aspects of a transfer

It is clear that the contractual rights and obligations of the parties themselves fall to be determined by the proper law of the transfer. This category includes such questions as whether there is an implied condition that the subject-matter of the transfer is of merchantable quality or fit for a particular purpose, or whether the transfer itself is formally valid.

Contractual questions governed by *lex actus*

The solution is not so obvious, however, where the question relates not to the personal rights of one party against the other, but to his right to some possessory or proprietary right in the chattel itself. If, in such a case, the *lex situs* and the proper law are not coincident, which is to prevail? It has been said that 'when the proper law of the transfer (*lex actus*) differs from the *lex situs* of the tangible movable at the time of the transfer, the *lex situs* governs the effect of the transfer on the

Seemingly, proprietary questions governed by *lex actus*

proprietary rights of the parties thereto and of those claiming under them in respect thereof'.¹

This statement is no doubt true where a claim good according to the *lex situs* is made by a third party, but there is no English authority which supports it where the dispute is confined to the parties themselves. The matter may be tested by the following hypothetical case that might well occur in fact.

A, domiciled and resident in England, executes an instrument in London granting possession of a crane which is stored at Naples to *X*, a London builder, upon hire-purchase terms under which the ownership is not to pass to *X* until he has paid the stipulated number of instalments. The crane is required by *X* in connexion with certain building operations in London.

If, upon the default by *X* to pay an instalment, *A* were to demand resumption of possession of the crane while it was still at Naples, it would be wholly unjustifiable to refer his claim to Italian law, whether the guiding consideration be principle, convenience, the expectation of the reasonable man or even plain common sense.

No clear
authority

It is, therefore, submitted that on principle questions of a proprietary or possessory nature affecting the validity or effect of a transfer and arising between the parties themselves are governed by the proper law of the transfer where this law differs from the *lex situs*. It must be admitted, however, that this principle must stand or fall on principle alone, for no authority is to be found by which it is either supported or rejected.²

Question of
the passing
of the pro-
perty in
movables

The proposition that the proper law prevails over the *lex situs* encounters a difficulty, more apparent than real, when these two laws have different rules concerning the passing of the property in movables. According to the present submission, if specific goods situated in country *X* are sold for cash in London under a contract that is subject to English law, the English rule that the title passes to the buyer on the completion of the contract prevails over a contrary rule of the law of *X*. To apply English law to the exclusion of the *lex situs* raises no practical difficulty, so long as the question is confined to the parties themselves or to their representatives. If anything further, such as delivery of possession, is required by the law

¹ Dicey, Rule 130, p. 560.

² The nearest approach to a relevant decision is *Inglis v. Usherwood* (1801) 1 East 515, but there Russian law was the *lex situs*, the *lex loci actus* and also apparently the proper law of the transfer.

of *X* to complete the title, the buyer, by the enforcement of the contractual side of the transaction, can compel the seller to take what steps are necessary. It is true, of course, that if, before these steps have been taken, the seller re-sells the goods to a third party and delivers possession to him in *X*, the title recognized by the proper law of the first sale cannot, by the very necessity of the case, avail the English buyer. *X* law, having control of the goods, can make its own view effective. But this fact does not disturb the principle that, as between the parties, the proper law determines whether the property in goods has passed to a buyer.

The same principle holds in the case of a gift *inter vivos* of ^{Gifts} chattels. If, merely by words of present gift spoken in London, an Englishman purports to pass to another the ownership of a horse kept at stables in Paris, no title whatsoever will pass to the donee. He will be frustrated by the English rule that a gift of chattels is a nullity unless confirmed by delivery or executed under seal. Even if French law were to have a less rigorous rule, it would not avail the donee. The exact point arose in *Cochrane v. Moore*¹ and was decided according to English law, but unfortunately French law was not pleaded. In another case it was necessary to determine the effectiveness of a *donatio mortis causa* of moneys in Monaco made by a testatrix who died domiciled in England. Russell J. held that English law applied as being the *lex domicilii* of the testatrix, that therefore an effective parting with dominion was required to make the gift valid, but that what was sufficient to pass the dominion must be determined by the law of Monaco.² Earlier Eve J. had held that the validity of a gift *mortis causa* is subject to the *lex situs*, but in the case with which he had to deal English law represented both the *lex situs* and the proper law.³

2. Questions affecting third parties.

The introduction of a third party raises different considerations and provokes a contrary line of approach. It is no doubt ^{Proprietary questions affecting a third party} true that if a third party claims derivatively under one of the original parties to a particular transaction his claim should in principle be tested by the proper law, not by the *lex situs* at the time of the transfer,⁴ and this no doubt is the rule where he appears as trustee in bankruptcy of one of those parties.

¹ [1890] 25 Q.B.D. 57. ² *In re Craven's Estate*, [1937] Ch. 423.

³ *In re Korvine's Trusts*, [1921] 1 Ch. 343.

⁴ Wharton, *Conflict of Laws* (3rd ed.), p. 690.

Indeed, if the matter were to be viewed solely in the light of principle and logic, the proper law would determine all cases of derivative claims. To revert once more to our hypothetical case of the crane,¹ suppose that *X*, the hire-purchaser, journeyed to Naples, took possession of the crane, and sold it to *Y*, an Italian. Presuming that Italian law would vest ownership in *Y*, an action brought against him by *A* should none the less, on general principles of jurisprudence, be tried according to English law, for the alleged derivative title of *Y* should stand or fall with *X*'s title from which its derivation is claimed. This was admitted by Turner L.J. in *Hooper v. Gumm*.²

Lex situs governs Nevertheless, as Holmes once said, 'The life of the law has not been logic, it has been experience',³ and in this type of case logic and principle must certainly yield to expediency. The *lex situs* must prevail on practical grounds. As Wolff says:

'Real rights should be as manifest as possible; third parties who intend to acquire a right in a thing must be protected against the risk that such thing might be subject to a foreign law under which the acquisition would be void. While under the law of contracts the contracting parties have a choice as to the applicable law because they alone are affected by the contract, the acquisition of a right *in rem* is something which concerns or may concern a great number of unknown strangers. As the place where a thing is situate is the natural centre of rights over it, everybody concerned with the thing may be expected to reckon with the law of such place.'⁴

Again, any attempt to measure the rights of the parties by some law other than the *lex situs* would be futile, for the last word lies with the authorities of the country in which the subject-matter is situated and it is unlikely that they would prefer a foreign to the local rule, or would permit the enforcement of a foreign judgment given on a principle contrary to that recognized by the local law.

This rule, that the *lex situs* prevails over the proper law, applies to two distinct types of case.

First, where a title, good by the *lex situs*, is claimed derivatively from one of the parties to an earlier transaction affecting the same movables and governed by a foreign proper law.

Secondly, to cases where the *lex situs* divests the title of the person recognized as owner by some foreign law or, while recognizing that title, subordinates it to a lien or other possessory right of its own making.

These two cases require separate treatment.

¹ *Supra*, p. 444.

² (1867), 2 Ch. 282, at p. 289.

³ *The Common Law*, p. 1.

⁴ Wolff, *op. cit.*, p. 520.

A familiar example of a derivative claim occurs where the subject-matter of a conditional sale, by which the ownership remains in the seller, is taken by the buyer from country *X*, where the sale was completed, to country *Y* and there sold to an innocent purchaser. If the derivative right of the purchaser is repudiated by the law of *X*, but recognized by the law of *Y*, it becomes necessary to decide which of these laws shall govern the matter. The instinctive reaction of the lawyer is to choose the law of *X*. Not only has it been said by high authority that 'a good title acquired in one country shall be a good title all over the globe',¹ but elementary principle demands that whether the vendee possesses a title capable of transfer shall be determined by the law under which he acquired his right to the subject-matter. However, justice and expediency demand that the *bona fide* transferee of movables shall be protected if he acts according to the local law, and there can be no doubt that a derivative title to movables, recognized as valid by the law of the country where the movables were situated at the time of its acquisition, will be regarded as valid by English law. A good title acquired under the proper law of a transfer is a good title all over the globe, unless and until it is displaced by a new title acquired under a foreign *lex situs*.²

Third party
claims
derivatively

But it is essential to appreciate exactly what is meant in this connexion by the ambiguous expression *lex situs*, for it does not necessarily mean the rule that a court sitting at the *situs* would apply to a purely domestic case containing no foreign element.³ The English court must ascertain what rule a court of the *situs* would apply to the particular case under consideration.

Lex situs
means the
law that
would be
applied by
a court at
the *situs*

Suppose, for instance, that a car transferred in England by *A* to *B* under a hire-purchase agreement is taken by *B* to Holland and is there sold to *C*. Suppose also that Dutch internal law requires hire-purchase agreements to be recorded in a public register, and holds that whether a sale by the hirer is binding upon the owner depends upon whether the agreement has been recorded.

A Dutch court, if required to adjudicate between *A* and *C*, would be confronted with a conflict of laws case. It would therefore be obliged to examine its own internal law in order to ascertain whether the necessity of recording a hire-purchase agreement applied to an agreement made abroad between two

¹ *Simpson v. Fogo* (1863), 1 H. & M. 195, 222, per Page-Wood V.-C.

² Cp. Niboyet (1928 ed.), p. 638.

³ Cp. Cook, *Logical and Legal Bases of Conflict of Laws*, pp. 263 et seqq.

foreigners. This would necessitate an investigation into the policy of the law. Was the object to protect persons in Holland who paid money on the faith of an ostensibly good title? If so, registration would be necessary in the case of all movables within the jurisdiction, no matter where or between whom the hire-purchase agreement had been made. If this were the correct interpretation of the registration law, then an English court, if seised of the case, should decide in favour of *C*. But the policy of the Dutch law might be different. Its design might be to strike only at agreements concluded in Holland. Or, though its object might not be restricted in this way, the Dutch courts, in the case of agreements concluded abroad, might have made the validity of a foreign agreement not registered in Holland turn upon whether the owner had consented or had not consented to the removal of the movables to another country.

Respective
functions
of private
inter-
national
law and the
lex situs

This simple truism, that the *lex situs* means the law that a court at the *situs* would apply to the case in hand and not necessarily the domestic law applicable to a purely domestic case, illustrates the correct role of private international law so far as individual assignments of movables are concerned. Its role is to choose what law shall determine the conflicting claims of the parties. Its function in this regard is completed as soon as it has ruled that the *lex situs* governs. Once this ruling has been given, once the choice of law has been made, we pass from the sphere of private international law, and it merely remains for the English court to ascertain as a fact what particular principle a court at the *situs* would follow in the actual circumstances. This appears to be an obvious and elementary observation, but it is sometimes overlooked, with the result that the complications of a part of the law not remarkable for its simplicity are needlessly increased. In dealing with the 'choice of law' problem that arises where the subject-matter of a hire-purchase agreement is removed to a foreign country and there sold, authors sometimes say that the governing law depends upon whether the removal was with or without the consent of the owner. If the removal was without his consent, they say that the question arising between the owner and the purchaser is governed by the law to which the hire-purchase agreement is subject; otherwise it is governed by the domestic rule of the *lex situs*. It is submitted that this is to confuse the provinces of private international law and of the domestic law of the *situs*. The *lex situs* is chosen because in the last resort it is

the only effective law. Of what use would it be, for instance, for English private international law to ordain that the *lex situs* applies only if the *res litigiosa* has been moved to the *situs* with the consent of the owner? What indeed is the relevance of consent? It is relevant only if the *lex situs* regards it as such. In the hypothetical case given above of the car moved to Holland, a Dutch court might, or it might not, treat the consent of the owner as the decisive factor, but it would refuse to be dictated to by a foreign system of law. If the guiding principle of Dutch law were that protection must be afforded to the innocent purchaser from an apparent owner, the court would scarcely be impressed by the argument that according to the foreign law under which the apparent owner obtained the goods he was precluded from passing a good title. Dutch law, having regard to the foreign element in the case, might abdicate, but it would not surrender.

The authorities, so far as they go, appear to support the proposition that the English court, when required to apply English law as being the *lex situs* in a foreign element case, does not necessarily apply the ordinary domestic law of England. *Dulaney v. Merry & Son*,¹ though it concerned a general assignment, may be given by way of analogy.

Two domiciled Americans executed a deed in Maryland by which they assigned all their property wherever situate to another domiciled American for the benefit of their creditors. The deed was valid by the law of Maryland, but it was not registered under the English Deed of Arrangement Act, 1887.

The question was whether the assignee was entitled to goods situated in England. This was determinable by the *lex situs*, English law. Had a similar assignment been effected in England between English traders concerning goods situated in England alone, there is no doubt that the deed would have been void. But this was a conflict of laws case, and therefore a necessary inquiry was whether the English statute was designed to strike at all assignments, wherever made, affecting goods in England, or whether its operation was confined to assignments made in England. After stating that the English legislature may enact rules as to the passing of the property in goods situated in England notwithstanding what the law might be in the country of the owner's domicile, Channell J. said that the question before him reduced itself to the construction of

¹ [1901] 1 Q.B. 536.

the Act of 1887. After subjecting this to a critical examination, he came to the conclusion that the policy of the Act as disclosed by its language was not to bring within its provisions an assignment by foreign debtors affecting goods abroad as well as goods in England. By internal English law, therefore, the Maryland assignment was valid with regard to the English goods.

Goetschius v. Brightman It may be excusable, perhaps, to examine the New York case of *Goetschius v. Brightman*¹ as a final illustration of how the *lex situs* should be ascertained when chosen to govern a question arising out of a transfer of movables. The facts were simple:

X obtained possession of a car in California from *Y* under a conditional sale contract by which the title remained in *Y* until the whole price had been paid. The contract expressly provided that the car should not be removed from California. *X*, however, took it to New York and there sold it to the defendants. The conditional sale was recorded neither in New York nor in California. By the municipal law of California applicable to a purely domestic case, the title of *Y* would prevail over that of the defendants; by the equivalent law of New York the title of the defendants would be preferred. The plaintiff was the assignee of *Y*.

The New York court, though it applied New York law as being the *lex situs*, found for the plaintiff. It is believed that the following is a fair summary of the judgment: the law which governs the interpretation and effect of the conditional sale is Californian law. By that law the title of the plaintiff is superior to that of the defendants. But, since the defendants bought the automobile while it was present in New York, it does not follow that New York law will recognize the superiority of the plaintiff's title.

'No rule of comity requires this State to subordinate its public policy in regard to transfers made within the State of property situated here to the policy of the State where the owner of the property resides or where he acquired title.'

The law of New York applies as being the *lex situs*. But what is the New York rule applicable to the circumstances of this case? A particular *lex situs* may prescribe that a person in the position of the present plaintiff may be divested of his title if the chattel has been removed out of his State whether with or without his consent. That, however, is not the rule in New York. The rule

¹ (1927), 245 N.Y. 186; Cheatham, *Cases on the Conflict of Laws* (2nd ed.), p. 776.

is that an owner shall not lose his title if the chattel is brought here without his consent. It is true that a conditional sale is void by New York statutory law against a purchaser unless it is filed, but this is confined to sales effected in New York, not in some other State or country.

The second class of case where the *lex situs* prevails arises where that law either divests the existing title under the foreign law or subordinates it to a possessory right in favour of a third party. There is adequate English authority on these matters.

Title of
owner
divested by
lex situs

The claim of a third party founded upon and substantiated under the existing *lex situs* of movables prevails over a title regarded as superior by any other law. The leading case is *Cammell v. Sewell*,¹ where the facts were these:

A Russian seller shipped in Russia a cargo of timber on a Prussian vessel to an English merchant in England. The vessel having been wrecked off the coast of Norway, the timber was sold to *X* at a public auction held at the instance of the master in Norway. A suit, brought by the underwriters in the Norwegian court to set aside the sale, failed. *X* shipped the timber to England and transferred it to the defendants. The underwriters sued the defendants for its value.

By English law, the auction sale had not affected the title vested in the merchant by the original contract and now vested in the plaintiffs. The defendants, however, did not deny the effect of that contract. They confessed and avoided it. Their case was that, by virtue of what happened in Norway at the time when the timber was there, they had acquired a title which under Norwegian law overrode that of the earlier English purchaser. The Court of Exchequer gave judgment for the defendants on the ground that the decision of the Norwegian court was a judgment *in rem* which vested the property in *X* as against the whole world. Upon appeal, the Court of Exchequer Chamber, without giving a definite decision upon the point, were of opinion that the judgment was not a judgment *in rem*, but they decided (Byles J. dissenting) that the title conferred on *X* by Norwegian law must prevail. Crompton J. said:

‘We think that the law on this subject was correctly stated by the Lord Chief Baron . . . when he says, “If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere.”’

He instanced the case of a foreigner’s goods being sold by a thief in market overt in England, and said that the property,

¹ (1858), 3 H. & N. 617; (1860), 5 H. & N. 728.

being vested in the purchaser according to English law, would not be divested if the purchaser took them into the foreigner's country. Byles J. dissented on the ground that the English rule, which prohibits a master from selling the cargo except in a case of inevitable necessity, is part of the universal law maritime; and he also refused to accede to the sweeping rule which Crompton J. adopted from the Lord Chief Baron.

Reduced to its simplest terms, then, *Cammell v. Sewell* decides that a man loses his ownership of goods if they are taken to another country and there transferred in circumstances sufficient by the local law to pass a valid title to the transferee.

Seizure by
creditors

The result is the same where movables have been seized by creditors in accordance with the *lex situs* at the time of their seizure. In such a case the rights vested in the creditors by the local law prevail against all persons claiming under some other law. Thus in *Liverpool Marine Co. v. Hunter*:¹

A British ship was mortgaged in England by *X*, a British subject, to *Y*, another British subject. It was later arrested at New Orleans, Louisiana, by certain British subjects who were creditors of *X*. The mortgage was void according to the law of Louisiana. In order to avoid a sale of the ship by the New Orleans Court, *Y* gave bonds to the creditors for the amount of their debts. *Y* subsequently filed a bill in England to restrain the creditors from suing on the bonds. Judgment was given for the creditors.

The mortgagee's argument was that the defendants had been guilty of inequitable conduct in taking legal action in America, but it was held that since the creditors owed no duty to the mortgagee, they were clearly entitled to avail themselves of the local procedure in respect of property within the jurisdiction. This, like *Cammell v. Sewell*, was a case where the owner's rights in a chattel were overridden by the operation of the *lex situs*.

A similar situation arose in *Inglis v. Robertson*,² where the facts were these:

G, a domiciled Englishman, the owner of whisky stored in a warehouse at Glasgow, held delivery warrants issued by the warehouse-keeper stating that the whisky was held to *G*'s order or 'assigns by endorsement hereon'. *G*, in return for a loan, delivered in London to *Inglis*, an English merchant, a letter of hypothecation stating that the whisky was deposited with him as security for the loan, with power of

¹ (1867), L.R. 4 Eq. 62; (1868), L.R. 3 Ch. 479. Lalive does not regard this case as an authority on the transfer of chattels, op. cit., p. 69.

² [1898] A.C. 616.

sale. He indorsed the warrants and handed them to Inglis. Inglis gave no notice of his right to the warehouse-keeper. Robertson, claiming as personal creditor of G, arrested the whisky in the hands of the warehouse-keeper.

Presuming that by English law Inglis, claiming through G, had a better right to the whisky than Robertson, would that conclude the matter in his favour? It would not do so if Scottish law were applicable, for the rule in Scotland is that a pledgee who wishes to make his pledges effective in such circumstances must give notice to the warehouse-keeper, otherwise his right is subordinated to the claims of the pledgor's creditor. The House of Lords gave judgment for Robertson. Lord Watson refused to discuss the internal law of England. After stating that Robertson had done what was necessary by Scottish law to acquire a real right against the whisky, he proceeded as follows:

'It would in my opinion be contrary to the elementary principles of international law, and, so far as I know, without authority, to hold that the right of a Scottish creditor when so perfected can be defeated by a transaction between his debtor and the citizen of a foreign country which would be according to the law of that country, but is not according to the law of Scotland, sufficient to create a real right in the goods.'

Again:

'The crucial question in this case is whether the right . . . vests in the pledgee of the documents, not a *jus ad rem* merely, but a real interest in the goods to which these documents relate. That is a question which I have no hesitation in holding must, in the circumstances of this case, be solved by reference to the law of Scotland. The whisky was in Scotland, and was there held in actual possession by a custodian for G as the true owner. That state of the title could not, so far as Scotland was concerned, be altered or overcome by a foreign transaction of pledge which had not, according to the rules of Scottish law, the effect of vesting the property in the whisky, or, in other words, a *jus in re*, in the pledgee.'

The transfer of movables while they are in course of transit raises a difficult question of choice of law.²

Case of
goods in
transitu

Suppose, for instance, that a parcel of goods has been dispatched overland from London to Bucharest, and that before reaching its destination it has been the subject of a sale or some other commercial transaction.

¹ Ibid., at p. 625.

² For a fuller discussion see Lalive, *op. cit.*, pp. 186-93; Wolff, pp. 519-21; Hellendall, 17 *Canadian Bar Review*, 25 et seqq.

The problems that such circumstances raise become more complex if the parties have different domicils, or if the transaction is effected in some country other than Rumania or England.

The theories



What law should be applied in such a case has not arisen in the English courts, the probable explanation being that goods in transit are generally represented by a bill of lading or other documentary symbol of ownership which is capable of an independent dealing.¹ Jurists have advocated several laws, such as the *lex situs*, the *lex domicilii* of the owner, the law of the place of ultimate destination, the law of the place of dispatch and the proper law of the particular transfer. Objections may be raised to each of these. The *lex situs*, owing to its inconstancy, is an impracticable choice unless the movables have come to a definite resting-place at the time of the transfer. The domicil of the owner is not a suitable criterion of the law to govern a mercantile transaction. The law of the stipulated place of destination, though an appropriate choice in many circumstances, suffers from the disadvantage that it may be and frequently is altered during the course of the transit. 'I am not prepared to hold', said Lord Watson, 'that whenever the cargo of a ship is destined to a port in one country, the dealings of the owner of the cargo with the bill of lading which represents and carries the property of the goods must in every other country be governed by the law of the *locus* where the ship is to unload.'² The law of the place of dispatch is not well adapted to govern a transfer effected abroad when the transit is nearing completion. The proper law is, no doubt, suitable to govern questions dependent upon the effect of a particular transaction but scarcely apposite to every question.

No one law governs exclusively in all cases

The truth again is that no one law can be made the exclusive arbiter of disputes arising out of a transfer of goods *in itinere*. The problems must be broken down. A dispute between the parties to a particular transaction, as, for example, a mortgage of the goods granted by the assignee, will be governed by the proper law of the transaction.³ If the movables come to rest

¹ There is, however, no clear authority upon what law governs the transfer of a bill of lading or other document of title to goods. The three possibilities seem to be the proper law of the bill of lading, the *lex situs* of the bill at the time of its endorsement, and the *lex situs* of the goods at that time. The point is important, since in some countries, e.g. France, the endorsement of a bill of lading does not pass the property in the goods; 17 *Canadian Bar Review*, 18-25. It is suggested that the correct choice is the *lex situs* of the bill of lading at the time of its endorsement.

² *Inglis v. Robertson*, [1898] A.C. 616, 627.

³ *In North Western Bank v. Poynter*, [1895] A.C. 56, the House of Lords was

sufficiently to admit of a dealing with them, as where they are seized by creditors in accordance with the local law or wrongfully sold by the carrier, the question of title must clearly be determined by the *lex situs*.¹ If the transit is by sea in one ship, there is much to be said for applying the law of the flag.²

II. ASSIGNMENTS OF *CHOSSES IN ACTION*

Choses in action may be divided into rights which are mere rights of action, and rights which are represented by some document or writing that is not only capable of delivery but in the modern commercial world is negotiated as a separate physical entity. A debt, arising from a loan or an ordinary mercantile contract, is an example of the first class, while the second class is chiefly exemplified by negotiable instruments and shares. It is proposed here to keep the two classes separate, and to deal first with debts, secondly with negotiable instruments, and thirdly with shares.

✓ (a) *Debts*

- (1) The various theories. *Pages 455-60.*
- (2) The modern law stated. *Pages 460-71.*
 - (i) Voluntary assignments. *Pages 461-8.*
 - (a) Questions dependent solely upon the validity and effect of the assignment. *Pages 461-6.*
 - (β) Questions dependent upon the transaction that created the debt. *Pages 466-8.*
 - (ii) Involuntary assignments. *Pages 468-71.*

(1) *The various theories*

The conflict of opinion which impedes the search for the proper law to govern an assignment of *choses in possession* is equally evident in the corresponding case of debts. Various theories have been propounded. The law of the place where the creditor is domiciled; the law of the place where the debt may be said to have an artificial situation; the law of the place where the assignment is made; the proper law of the assignment; the proper law of the transaction that created the debt; all these legal systems have found their advocates.

prepared to apply the English proper law of a transfer between *A* and *B* to the right of creditors to seize the subject-matter in Scotland.

¹ *Cammel v. Sewell*, *supra*, p. 451.

² *Cp. Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115.

*Lex
domicilii*
of creditor

Story chooses the law of the creditor's domicil.¹

'This head', he says, 'respecting contracts in general may be concluded by remarking that contracts respecting personal property and debts are now universally treated as having no *situs* or locality; and they follow the person of the owner in point of right (*mobilia inhaerent ossibus domini*); although the remedy on them must be according to the law of the place where they are sought to be enforced. . . . They are deemed to be in the place, and are disposed of by the law, of the domicil of the owner, wherever in point of fact they may be situate.'

In the three sections which he devotes to the subject² he produces an impressive list of Continental authorities, but does not cite any clear decision, either English or American, in favour of the creditor's domicil.

Objections
to *lex
domicilii*

There appears to be neither authority nor reason for choosing the *lex domicilii* as such, either of the creditor or the debtor, as the proper law to govern an assignment of a debt, and in fact cases may be put in which the choice would lead to absurdity. If a domiciled Englishman, having acquired a right to receive a sum of money from a German by reason of some commercial transaction governed by the law of France, were to assign that debt first to one man in Italy and then to another in Switzerland, it is difficult to adduce any principle which would justify the settlement of a dispute between the parties according to the law either of England or of Germany. On the contrary, the assignee of a debt could not reasonably be expected to realize that he was subjecting his rights to the *lex domicilii* either of the creditor or of the debtor, especially as the place of domicil might well be an unknown quantity.

Lex situs

Westlake, having asserted that assignments of corporeal movables are governed by the *lex situs*,³ maintains that the forum for the recovery of a debt presents a close analogy to the *situs* of a corporeal movable, and states the English rule to be that 'the assignee who has acquired a good title by the law of the forum for the recovery of the debt must prevail'.⁴

Recognized
that a debt
possesses a
situation

With regard to this theory there can, of course, be no doubt that a debt is deemed by English law to have a definite locality of its own for several different purposes, such as the exercise of jurisdiction, the payment of death duties, and the grant of probate or of letters of administration.⁵ The necessity for this

¹ S. 362. To the same effect, Phillimore, iv. 544.

² S. 362-362b.

³ S. 150.

⁴ S. 152.

⁵ See, for example, *A.-G. v. Bouwens* (1838), 4 M. & W. 171, 191; *Commissioners of Stamps v. Hope*, [1891] A.C. 476, 481-2; *A.-G. v. Lord Sudeley*,

and the test by which the locality is determined have been explained by Atkin L.J. in the following words:

'A debt, or a *chose in action*, as a matter of fact, is not a matter of which you can predicate position; nevertheless, for a great many purposes it has to be ascertained where a debt or a *chose in action* is situated, and certain rules have been laid down in this country which have been derived from the practice of the ecclesiastical authorities in granting administration, because the jurisdiction of ecclesiastical authorities was limited territorially. The ordinary had only a jurisdiction within a particular territory, and the question whether he should issue letters of administration depended upon whether or not assets were to be found within his jurisdiction, and the test in respect of simple contracts was: Where was the debtor residing? . . . The reason why the residence of the debtor was adopted as that which determined where the debt was situate was because it was in that place where the debtor was that the creditor could, in fact, enforce payment of the debt.'¹

This rule, that a *chose in action*, such as a right to recover a loan² or money due under an insurance policy,³ is situated in the country where the debtor resides,⁴ encounters an apparent difficulty where, as will often occur in the case of a corporation, the residence extends to two or more countries. Since the place of residence is chosen because it is there that recovery by action is possible, it has been suggested that a debt is situated in the country where it is payable even though this does not represent the residence of the debtor. The courts, however, have not taken this view. They have insisted that the residence of the debtor is 'an essential element in deciding the *situs* of the debt'.⁵ If the debtor resides in two or more countries, then indeed the debt is situated in the one in which, either by the contract itself or by the general law, it is payable;⁶ but if he resides only

Debt
situated
where
debtor
resides

[1896] 1 Q.B. 354, 360-1; *In re Maudslay Sons & Field*, [1900] 1 Ch. 602; 13 *Canadian Bar Review* (May 1935), 265-78, article by Dean Falconbridge. See also *supra*, p. 191.

¹ *New York Life Insurance Co. v. Public Trustee*, [1924] 2 Ch. 101, 119.

² *In re claim by Helbert Wagg & Co. Ltd.*, [1956] Ch. 323.

³ *Jabbour v. Custodian of Israeli Absentee Property*, [1954] 1 W.L.R. 139; *New York Life Insurance Co. v. Public Trustee*, [1924] 2 Ch. 101.

⁴ *Swiss Bank Corporation v. Boehmische Industrial Bank*, [1923] 1 K.B. 673. 678; *Sutherland v. Administrator of German Property* (1933), 50 T.L.R. 107.

⁵ *Deutsche Bank und Gesellschaft v. Banque des Marchands de Moscou* (unreported, C.A. 1930, but cited, *In re claim by Helbert Wagg & Co. Ltd.*, *supra* at p. 343); the quotation in the text is from Greer, L.J.

⁶ *In re Russo-Asiatic Bank* [1934] Ch. 720. A debt due from a bank to a customer, for instance, is deemed by the general law to be situated at the branch where the account is kept, *Joachimson v. Swiss Bank Corporation*, [1921] 1 K.B.

in one country, it is there alone that the debt is situated notwithstanding that it may be expressly or implicitly payable elsewhere.¹

Lex situs
does not
govern all
questions

(The fact, however, that a debt possesses a definite situation does not necessarily imply that its assignment should be governed by the *lex situs*.)

Lex loci
actus

English judges have more or less consistently held that an assignment is governed by its *lex loci actus*.²

They would hold, for instance, that if *A* executes two instruments in Guatemala, by which he assigns, first to *X* and subsequently to *Y*, a sum of money held on his behalf by a London Bank, the question whether *X* or *Y* is entitled to the money must be determined by the law of Guatemala as being the *lex loci actus* of each assignment.

Lex actus

Another theory, which does not appear to have been canvassed, is that the governing system is the *lex actus*, i.e. the law of the country with which the assignment is most closely connected. This is preferable to the *lex loci actus*, since it does not depend upon the chance place of execution, but nevertheless it would seem to be less convenient than still another law which will now be discussed.

Proper law
of trans-
action that
created the
debt

It is submitted that there is an obvious answer to the question —What is the most appropriate law to govern questions arising from the voluntary assignment of a *chose in action*? The clue is furnished by Foote, when he says that the assignment of a *chose in action* arising out of a contract is governed by the proper law of the contract.³ If we understand him correctly, the appropriate law is not the 'proper law' (using that expression in its contractual sense) of the assignment, but the proper law of the original transaction out of which the *chose in action* arose. It is reasonable and logical to refer most questions relating to a debt to the transaction in which it has its source and to the legal system which governs that transaction. If the transaction under which *A* lends money or sells goods to *B* is connected with no other country but England, *A* acquires a right that is admittedly governed by English law. The right thus created under the aegis of English law should, so far as

110, 127; *Clare & Co. v. Dresdner Bank*, [1915] 2 K.B. 576; *Richardson v. Richardson*, [1927] P. 228.

¹ *In re claim by Helbert Wagg & Co. Ltd.*, [1956] Ch. 323.

² *Lee v. Abdy* (1886), 17 Q.B.D. 309; *Alcock v. Smith*, [1892] 1 Ch. 238; *Embriicos v. Anglo-Austrian Bank*, [1905] 1 K.B. 677; *Republica de Guatemala v. Nunez*, [1927] 1 K.B. 669; *In re Anziani*, [1930] 1 Ch. 407; *infra*, p. 464.

³ p. 296.

its assignability is concerned, be governed throughout its existence by English law. This is not to deny that certain questions are determinable by the proper law of the assignment itself, as for example those concerned with the formal validity of a particular assignment and arising between the parties or their representatives. But when the question travels beyond these boundaries—when, for example, it is denied that the right is capable of assignment—a solution must obviously be sought elsewhere. What is more reasonable than to refer to the law that admittedly continues to govern the subject-matter of the assignment? One undeniable merit of this is that, where there have been assignments in different countries, no confusion can arise from a conflict of laws, since all questions are referred to a single legal system. The same merit is not shared by the *lex situs*, since this follows the residence of the debtor and is not therefore a constant.

Two illustrations may be given to show that the application of the proper law of the original transaction out of which the debt arose is at least logical.

Doctrine of
the proper
law illus-
trated

A policy of life assurance issued by an English company is undeniably governed by the law of England. Both parties, for instance, contemplate that the policy may be assigned in any part of the world and that payment must be made to the assignee no matter where his title was acquired, but the reasonable inference is that they intend the effect of the assignment, so far as the liability of the company is concerned, to be governed by English law.

Again, if an Englishman contracts a debt as the result of the purchase of goods from another Englishman in London, his obligation, if expanded in words, is to pay not only the seller but also any assignee of the seller, provided however that the assignment is good by English law. What governs his liability to the seller must also govern his liability to any person deriving title from the seller.

In each of these two cases the attention of the debtor, when he assumes that role, is confined solely to the legal system under which he contracts the obligation, and the reasonable inference is that any transfer of the obligation made by the creditor shall be governed by the law of England as being the legal system to which the subject-matter of the transfer owes its existence.

Let us turn from the debtor and, taking the test of the reasonable man, contemplate the attitude of mind of an assignee. If *B*, the debtor under the original transaction from which the obligation sprang, takes up his residence in Italy, and *A*, the creditor, makes in France an assignment of the

Doctrine of
the proper
law justi-
fied

debt to *X*, it is reasonable to presume that *X*, as a prudent man of business, will concentrate his attention upon the transaction which gave rise to *B*'s obligation to pay, for it is the benefit of that obligation of which he is a purchaser. It will naturally occur to him that an obligation having its origin in, and drawing its protection from, English law will in all respects be subject to that law, just as much as if the subject-matter of the assignment were goods situated in England or shares in an English company, and we should naturally expect him to inquire what is necessary under English law for the completion of an effective assignment. What would not occur to him would be to consider the law of Italy merely because of the debtor's presence in that country. It would, perhaps, be convenient to allow the law of France, *qua* the proper law of the assignment, to govern the rights of *A* and *X* *inter se*, but, to take only one example, it cannot solve a question of priorities between *X* and an assignee claiming under an assignment made in some other country, except in the simplest case.

Suppose, to alter the instance given on page 458, that *A* makes an assignment to *X* in Guatemala, and later, in fraud of *X*, makes another assignment to *Y* in Italy.

There is here no common *lex loci actus* and no common *lex actus*. If the Italian and Guatemalan rules of priority differ, the dispute between *X* and *Y* cannot be settled by reference either to the law of the place of the assignment or to the proper law of the assignment, for there are two such laws, each independent, with no arbiter to decide which of them shall prevail.

It is submitted, then, that the most appropriate law to govern the question at any rate of priorities is the proper law of the transaction by which the subject-matter of the various assignments was created. It is further submitted that this principle was adopted by Warrington J. in *Kelly v. Selwyn*.¹

(2) *The modern law stated*

Division of the subject We must now, however, abandon theory and attempt to ascertain from the English authorities what law governs the assignment of a debt. This question is for two reasons not so simple as it may appear.

Voluntary and involuntary assignments First, there are two types of assignment, the voluntary and the involuntary. The former occurs where the creditor of his own will transfers his right to another person; the latter, where

¹ [1905] 2 Ch. 117; *infra*, p. 467.

his right is transferred against his will by operation of law, as, for example, where in the course of execution the debt is attached as being part of his assets.

Secondly, the questions in which the issue is the validity or effect of an assignment fall into two classes. The issue may depend solely upon the validity and effect of the assignment itself, as, for example, where the dispute relates to capacity, form or essential validity; or it may depend upon the validity and effect of the original transaction by which the debt was created, as, for example, where the question is whether the debt is capable of assignment, or to which of two or more competing assignees it is payable. The burden of the following pages is that the first class of question is governed in general by the proper law of the assignment, the latter by the proper law of the transaction that created the debt.

Matters
affecting
voluntary
assign-
ments
classified

(i) *Voluntary assignments.*

(a) *Questions dependent solely upon the validity and effect of the assignment.* Before discussing the topics that fall within this class of question it will be convenient to state the facts of the important case of *Republica de Guatemala v. Nunez*,¹ to which reference must frequently be made.

*Republica
de Guate-
mala v.
Nunez*

In 1906 Cabrera, who was then President of Guatemala, deposited a sum of money with a London bank. In July 1919, while still President, he addressed a letter to the bankers requesting them to transfer this sum to Nunez, his illegitimate son. Cabrera was deposed and imprisoned in 1920. While imprisoned he assigned under duress the sum to the Republic, acknowledging that he had misappropriated it from the public funds. In an action brought by the Republic to recover the money, Nunez claimed ownership by virtue of the assignment of 1919. This assignment was valid by English law but void by the law of Guatemala because (i) being unsupported by consideration, it should have been made on stamped paper and signed by Nunez before a notary, and (ii) Nunez, being a minor, lacked capacity to accept a voluntary assignment. It will be observed that English law was the *lex situs* of the debt and also the proper law of the transaction out of which the debt arose, but that Guatemalan law was the *lex loci actus* and the proper law of the assignment, and also the *lex domicilii* of the assignor and assignee. It was held by Greer J. and by the Court of Appeal that the validity of the assignment to Nunez must be determined by the law of Guatemala. The decision was unanimous, but, as we shall see, the reasons upon which it was based were varied and conflicting.

¹ [1927] 1 K.B. 669.

Similarity
of assign-
ments to
contracts

We will now deal separately with the various causes for which the assignment of a debt may be invalid, premising our remarks with the observation that, since an assignment arises from a contract between the assignor and the assignee, the rules for the choice of law in this connexion should as far as possible be the same as those which apply to contracts.¹

Capacity
generally
said to be
governed
by *lex loci
actus*

Capacity. The assignment of a debt, so far as concerns the capacity of the parties, stands on the same footing as a mercantile contract, in which case the question is governed by the proper law of the contract.² In the case of an assignment the choice would appear to lie between the proper law of the assignment (*lex actus*) and the proper law of the transaction that created the debt. A case can be made out for either of these laws. The latter is preferable on the score of convenience. If President Cabrera of Guatemala deposits money with an English bank in circumstances which render the transaction subject to English law, it seems unreasonable, in fact oppressive, that the bank's duty to pay assignees should be governed by the law of any country in the world where Cabrera might chance to assign his right. A debtor cannot reasonably be expected to do more than make a payment that is recognized as valid by the law to which his obligation has throughout remained subject. The English authorities, however, have selected neither the proper law of the assignment nor the proper law of the transaction that created the debt. They have preferred, at any rate in terms, a most unfortunate *tertium quid* in the shape of the *lex loci actus*. In *Lee v. Abdy*:³

*Lee v.
Abdy*

A policy of life insurance issued by an English company was assigned at the Cape by a husband to his wife. The assignment was valid by English law, but was invalid by the law of Cape Colony, where the parties were domiciled, because the assignee was the wife of the assignor. The insurance company, when sued by the wife for the recovery of the money, pleaded that the assignment was void.

It was held that the law of Cape Colony governed the assignment, on the ground that it was the *lex loci actus*. The argument that English law should apply was rejected. According to Wills J., a company which issues a policy must be taken to contract subject to the condition that an assignment shall be

¹ 'The assignment here in question is an assignment that exists, if at all, by virtue of a contract between assignor and assignee, and I cannot see how, if there was no valid contract between them, there can be any valid assignment'; *Lee v. Abdy* (1886), 17 Q.B.D. 309, 313, *per* Day J.

² *Supra*, p. 223.

³ (1886), 17 Q.B.D. 309.

governed by the law of the place where it may chance to be made. He was vaguely but not unduly disturbed by the thought that this would throw a somewhat heavy burden upon English companies. It is material, however, that the policy had been issued to the husband in South Africa.

In *Republica de Guatemala v. Nunez*,¹ Scrutton L.J. gave as one of his reasons for deciding against the claim of Nunez the fact that he was incapable by the law of Guatemala. He said that 'in cases of personal property, the capacity of the parties to a transaction has always been determined either by the *lex domicilii* or the law of the place of the transaction; and where, as here, the two laws are the same it is not necessary to decide between them'.² It is a little surprising in these latter days to meet the suggestion that the capacity of a person to enter into a mercantile contract is determined by the law of his domicile; little less surprising is the suggestion that the determining law is the *lex loci actus*, if that expression is to be taken literally. Is an assignment by an Englishman to his wife of a debt situated in London and governed by English law to be held void, merely because he executes the instrument of transfer at the Cape while on a short visit to South Africa?

Lex loci actus supported by Scrutton L.J.

These two authorities, then, decide in terms that capacity is governed by the *lex loci actus*. The only question is whether the judges meant the expression *lex loci actus* to be taken literally and rigidly, or whether they intended to indicate the proper law of the assignment. The *lex loci contractus* so often constitutes the proper law of the contract that even judges are apt to adopt the former expression when their intention is to refer to the proper law. This was especially true in the 'eighties when *Lee v. Abdy* was decided. In fact in that case Day J. stated the rule for contracts in language that was scarcely felicitous. He said: 'The general rule is that the validity and incidents of a contract *must be determined* by the law of the place where it is entered into.'³

Does *lex loci actus* mean the proper law?

Formalities. In the chapter on contracts we have seen that a contract is formally valid if it is made in accordance with the formalities required either by the *lex loci contractus* or by the proper law. There is no adequate reason why the same rules should not apply to the assignment of a *chose in action*.

Lex loci actus said to govern formalities

In *Republica de Guatemala v. Nunez*,⁴ Scrutton L.J., agreeing

¹ *Supra*, p. 461.

² [1927] 1 K.B. at p. 689. Lawrence L.J. agreed with him on the point.

³ Italics supplied.

⁴ *Supra*, p. 461.

on this point with Greer J., decided against the claim of Nunez on a second ground. He said:

'A contract void in the place where it is made, by reason of the omission of formalities required by the law of that place, is void elsewhere.'¹

There is no need to add anything to the criticism already directed against this rigid view that the *lex loci* is the exclusive determinant,² except perhaps to ask this question—Is the assignment of an English debt made by an Englishman to his infant son to be regarded as void, merely because the instrument of transfer was executed at Istapa, without the local formalities, while the parties were on a short visit to Guatemala?

Lex situs
said to
govern
formalities In the same case Lawrence L.J. held that, since the debt was situated in England, its formal validity must be tested neither by the *lex loci actus* nor by the *lex domicilii* of the parties, but by English law as being the *lex situs*.

Lex loci
actus said
to govern
essentials *Essentials.* If the analogy between a contract and an assignment is justifiable,³ it is difficult to appreciate why the established rule that refers the essential or material validity of a contract to the proper law should not apply to the transfer *inter vivos* of a *chose in action*. Yet a certain confusion of mind appears to distinguish the few authorities that have had to deal with the matter. A relevant decision is *In re Anziani*.⁴

A married woman, domiciled in Italy, being entitled to certain moneys under a settlement drafted in the English language and form and the trustees of which were persons resident in the United Kingdom, made a voluntary assignment in Rome of part of the settlement funds to two trustees, both of whom resided in London. The assignment was void by Italian law since it did not comply with a requirement of the civil code, but the significant fact to observe is that this requirement was regarded by Italian law, not as a mere matter of form, but as an essential element of the assignment.⁵

Thus the issue related to the essential validity of the assignment. Which law, Italian or English, was to govern this question of validity? Maugham J. chose Italian law. Having regard to the authorities, no serious objection can be raised to this if he did so on the ground that Italian law was the proper law of the assignment and was therefore appropriate to govern

¹ [1927] 1 K.B. at p. 690.

² *Supra*, pp. 228–9.

³ *Lee v. Abdy* (1881), 17 Q.B.D. 309, 313; *supra*, p. 642 note 1.

⁴ [1930] 1 Ch. 407.

⁵ [1930] 1 Ch. at p. 418.

essentials, though it would seem more rational that the validity of a disposition of an interest in a trust, created under and subject to English law, should be tested by that law. The learned judge, however, chose Italian law as being the *lex loci actus*, and he based this decision upon the proposition of Scrutton L.J. in the Guatemalan case that the *lex loci contractus* governs formalities. Whether Scrutton L.J. was right or wrong, it was certainly not justifiable to tear his statement from its context and to extend it to the different question of essentials. It is only where the *lex loci contractus* happens also to be the proper law that it is entitled to govern essentials. Too much stress, however, need not be laid upon the exact wording of the judgment, for it is not, perhaps, unreasonable to regard Italian law as having been the proper law of the *assignment*.

It is impossible to remain uncritical of the judiciary after this perusal of the decisions in which the issue has been the validity and effect of assignments of debts. The impression gained is that there has been a retrogression to the days when the private international law of contracts was still inchoate and undeveloped, days when it was common to find statements which laid excessive stress upon the *lex loci contractus*. The authorities just considered appear to rule that the actual place where the assignment of a debt is effected determines the law by which all disputes concerning the transaction are governed. This no doubt is a workable principle, but is it convenient, or indeed is it consistent with other principles germane to the subject? Let us test it by an example.

Unsatisfactory state of the authorities

A, an Englishman, signs a contract at Lausanne by which he agrees to build an aeroplane at his Coventry works and to sell it to *B*, another Englishman resident in London, for £150,000. In these circumstances few would doubt that the capacity of the parties, the requisite formalities, and the validity and effect of the contract would be determinable by English law, except that compliance with the Swiss formalities would be sufficient though not essential. The next day, in the course of his homeward journey, *A* signs a document in Paris by which he purports to assign to *C*, a domiciled Scotsman, the debt of £150,00 that will ultimately become due from *B*.

Are we really to suppose that any dispute concerning the assignment is to be governed by French law? Is the fortuitous place of execution so significant? If *A* becomes involved in difficulties both with *B* and with *C*, difficulties that may possibly arise from the same event, is his legal position to be determined at one angle by English law and at another by the

law of France? The suggestion is surely the negation of logic and common sense, and one that can scarcely survive the test of experience.

(β) *Questions dependent upon the transaction that created the debt.* The assignment of a debt may raise a question that cannot be answered without considering the legal effect of the transaction to which the debt owes its origin. In such a case it is imperative, if a satisfactory solution is desired, to be guided exclusively by the proper law of that transaction. Suppose, for example, to take an Illinois case, that:

A, employed by *B* in Indiana, makes in Illinois an assignment to *C* of all the wages earned or to be earned by him under his contract of employment. By the law of Indiana the assignment of future wages is prohibited, by the law of Illinois it is permissible. Is the purported assignment of the future wages effective?¹

In this case *A* has purported to assign a certain right of property. It is necessary, therefore, to examine the nature and attributes of this right, and for this purpose to refer back to the legal system under which it has arisen. Neither its contents nor its characteristics can be altered merely because it has been the subject of a later transaction that in certain respects is subject to a foreign system of law. Such questions as whether the assignment is voidable for fraud or unenforceable for lack of a written memorandum are no doubt determinable by the law of Illinois, but the primary and fundamental question, whether the subject-matter is even capable of assignment, falls to be determined by the law of Indiana, the proper law of the contract of employment.

What law
governs
question of
priorities?

The proper law of the transaction under which a debt arose is also the only satisfactory legal system by which to determine the ranking of competing claimants where the creditor has made more than one assignment. A true question of priorities arises where there have been two or more valid assignments, the ranking of which is doubtful. This was not the case in *Republica de Guatemala v. Nunez*, since each of the successive assignments was for different reasons invalid. The assignment to Nunez was held to be void on several grounds, and a later assignment made to the Republic by Cabrera during his imprisonment in 1921 was rejected by the court on the ground of duress. In the result, therefore, the money deposited with the

¹ *Coleman v. American Sheet and Tin Plate Co.* (1936), Ill. App. 542; Cheatham, *Cases on Conflict of Laws* (3rd ed.), p. 631.

bank passed to the creditors of Cabrera.¹ A question of priorities, however, was raised in *Kelly v. Selwyn*,² where the facts were these:

*Kelly v.
Selwyn*

By an assignment executed in 1891 in New York, where he was then domiciled, X assigned to his wife his interest in certain English trust funds. Notice was not given to the trustees until twelve years later, since none was required by the law of New York. In 1894 X assigned the same interest to the plaintiff by a deed executed in England. Immediate notice of this was given to the trustees.

It was held that the plaintiff ranked first, since the rights of the claimant fell to be regulated by English law. Warrington J. said:

Proper law
of subject-
matter of
assignment
governs

‘The ground upon which I decide it is that, the fund here being an English trust fund and this being the court which the testator may have contemplated as the court which would have administered that trust fund, the order in which the parties are to be held entitled to the trust fund must be regulated by the law of the court which is administering that fund.’³

In an earlier passage the learned judge stressed the fact that he was ‘administering an English trust fund, constituted by an English testator who may be taken to have made his will with the English law in his mind’.⁴ The exact *ratio decidendi* is perhaps doubtful. The somewhat ambiguous language of the learned judge leaves it a little doubtful whether he chose English law as being the *lex fori*, or the *lex situs*, or the proper law of the debt. According to Westlake⁵ and Scrutton L.J.,⁶ he treated the issue as one for the *lex fori*. It is submitted, however, that the decisive factor in the mind of the judge, if his language is considered as a whole, was that the subject-matter of the assignment consisted of a trust fund, the proper law of which was English law.⁷

This view, that the proper law of the assigned debt is decisive in a question of competing assignees, is approved by some English writers⁸ and it prevails in German, Swiss and Scandinavian laws.⁹ This law also decides whether notice of an

¹ *Republica de Guatemala v. Nunez* (1926), 95 L.J. (K.B.) 955.

² [1905] 2 Ch. 117; also in *Le Feuvre v. Sullivan* (1855), 10 Moo. P.C. 1.

³ At p. 122.

⁴ At p. 121.

⁵ Westlake, s. 152.

⁶ *Republica de Guatemala v. Nunez*, [1927] 1 K.B. 669.

⁷ Morris, *Cases on Private International Law* (2nd ed.), pp. 290–1.

⁸ Dicey, p. 576; Wolff, p. 538; Graveson prefers the *lex situs*, op. cit., p. 254; also Schmitthoff, *The English Conflict of Laws* (2nd ed.), pp. 209–10.

⁹ Wolff, p. 538.

assignment must be given to the debtor or whether the assignee takes subject to equities. A possible objection to the claim of the proper law of the debt to govern priorities is the general rule that, in the administration of an estate by the court, as, for instance, upon bankruptcy or intestacy, the priority of creditors is determined by the *lex fori*.¹ But assignees of a debt stand on a different footing from creditors in this respect. Where the bankruptcy court administers the English assets, the whole of which are under its control, chaos would result if, instead of adopting the English method of distribution among all creditors, whether foreign or not, it were required to incorporate other methods recognized by alien laws with which some of the debts might be connected. But equal chaos results if the *lex fori*, as such, is allowed to regulate the priority of assignees. If in *Kelly v. Selwyn* action had been brought by X's wife in New York, a judgment given according to the *lex fori* would have been in her favour. If the plaintiff had then sued in England, judgment would have been for him, not for the wife. Confronted with this conflict, the English court, being in control of a trust that was subject to English law, would not unnaturally prefer its own view of the respective rights of the parties. The dominating fact is, of course, that a dispute between competing assignees must of necessity be referred to one arbiter and to one only. This may be the *lex situs* of the debt or the proper law of the debt, as here advocated, but it cannot be that variable quantity, the *lex fori*.

(ii) *Involuntary assignments.*

**Garnish-
ment** The involuntary assignment of a debt frequently occurs in the case of what is called garnishment. This is a process by which a judgment creditor attaches a sum of money that is due to the judgment debtor from a third party, called the garnishee. If the necessary proceedings are taken the court may order that the garnishee shall pay the money direct to the judgment creditor.

**Garnish-
ment
governed
by the
*lex situs*** In purely domestic proceedings, where the parties and the relevant transactions are connected solely with England, the garnishee is, of course, effectively discharged from further liability once he has paid the judgment creditor. The position, however, is not so straightforward in a case containing a foreign element, for a garnishee, having already complied with an order made in one country, will remain liable to pay his

¹ *Infra*, pp. 498, 521-2.

debt a second time if he is sued by the judgment debtor in a foreign court which refuses to recognize the validity of the order.¹ The question, therefore, is to ascertain what confers jurisdiction upon the English court to make a garnishee order that will, or ought to, command international effect. The danger of a double liability was mooted in *Swiss Bank Corporation v. Boemische Industrial Bank*.²

The plaintiffs had recovered judgment for a large sum of money against the defendants, a company carrying on business exclusively in Czechoslovakia. The defendants kept an account at a London bank where their balance was over £9,000. The plaintiffs issued a garnishee summons against the bank.

It was objected that to make a garnishee order in these circumstances would be inequitable, since the bank, if sued later in Czechoslovakia, would probably be ordered to pay the sum over again to the defendants. The Court of Appeal nevertheless made the order. It laid down the rule that jurisdiction in garnishee proceedings rests with the court of the country where the debt is situated, which was England in the instant case.

No criticism can be directed against this decision, for a Czech court could scarcely deny that a debt due from an English bank and payable on demand in London was exclusively subject to any order that the English court might make. Since, however, a debt is usually regarded as situated in the country where the debtor resides and since residence is an ambiguous term having no constant meaning in all situations, it is too broad a generalization to say that garnishee jurisdiction exists in the country where the debtor resides. To state the rule so broadly may well cause injustice if he has a multiple residence. For example:

G, an Irishman, borrows £500 in Dublin from D, another Irishman. Before repayment of the loan, G becomes temporarily resident in London. While he is there the debt is garnished by X, to whom D owes £1,000.

The result is that if the Irish court refused to recognize the validity of the English proceedings, G would be liable in Ireland to make a second payment of £500, this time to D.³ It is essential, therefore, in the case of garnishment proceedings What the
lex situs is

¹ *Martin v. Nadel*, [1906] 2 K.B. 26.

² [1923] 1 K.B. 673.

that some restriction should be placed upon the general principle that presence in a country is sufficient to found jurisdiction. It is difficult to state the rule with exactitude, but it is probably true to say that a debt is properly garnishable in the country where, according to the ordinary usages of business, it would normally be regarded as payable.¹ The courts of that country alone are competent to make a garnishment order that is entitled to international validity.

Priorities
also
governed
by *lex situs*

The *lex situs* of the debt which it is sought to attach determines, not only the question of jurisdiction, but also the effect of the garnishment as regards third parties. If, for example, an involuntary assignment occurs after a voluntary assignment has already been made, the *lex situs* determines whether the rights of the voluntary assignee have been postponed or defeated; if the involuntary assignment occurs first, the *lex situs* determines what rights, if any, the voluntary assignee has acquired. A question of priorities arose in the case of *In re Queensland Mercantile and Agency Co.*,² the facts of which were as follows:

The Union Bank of Australia held debentures issued by the Queensland Company charging the shares in that company that were not fully paid up. The bank was domiciled in England and the company in Queensland. After the capital had been called up, but before it was paid by the shareholders, who thus became debtors of the company, the X Company, domiciled in Scotland, began an action for negligence in Scotland against the Queensland Company, and immediately issued the Scottish process of arrestment against numerous shareholders who were domiciled in Scotland. The effect of this process according to Scottish law was to prevent the shareholders, pending a decision in the action of negligence, from paying the calls to the company.

The question that fell to be decided was whether the Union Bank, as debenture-holders, were entitled to be paid first out of the unpaid shares, according to the law of England and of Queensland, or whether the X Company, in accordance with the law of Scotland, had a prior right over the shares to the extent of the damages that they might be awarded in the action of negligence.

A question of priorities between two assignees was thus raised. The Union Bank contended that the question fell to be decided by the law of Queensland, since the Queensland Company was a creditor in respect of the unpaid shares and any assignment by it must be tested by the law of its domicil.

¹ *Supra*, pp. 457-8, and cases there cited.

² [1891] 1 Ch. 536; *affd.* [1892] 1 Ch. 219.

North J., however, applied Scottish law. His reasoning was that since the debtors were resident in Scotland and therefore the unpaid calls which formed the subject-matter of the assignments were situated in that country, the assignments must rank in the order prescribed by Scottish law. He assimilated *choses in action* to tangible movables, asserting that an assignment of the latter class of property is governed by the *lex situs*.

It must finally be observed that whatever may be the proper law to govern the effect of an assignment, whether voluntary or involuntary, it is subject to the overriding rule that the *lex fori* governs all matters of procedure. This may have an important bearing upon the assignment of a debt. Suppose, for instance, that

Procedural
matters
governed
by the *lex
fori*

a Frenchman assigns by way of charge to another Frenchman a sum of money due from a French debtor, the assignment being made in France and according to the law of that country.

According to the rules of private international law, the assignment has universal validity. According to English domestic law, the assignment is valid, but the assignee cannot recover the money unless he makes the assignor a party to the action against the debtor. If this rule as to joinder of parties is to be regarded as a procedural rule for the purposes of private international law, a question which will be discussed later,¹ it must be obeyed in an action brought in England notwithstanding that it is not recognized by French law.

(b) Negotiable instruments

Until the decision of the Court of Appeal in *Koechlin v. Kestenbaum*,² it was difficult to specify with absolute assurance the system of law by which the validity and effect of a transfer of a negotiable instrument was determined, for it was doubtful whether the matter was concluded by the Bills of Exchange Act, section 72, or whether it was covered by the general principles of private international law. If, to take a simple illustration, a bill of exchange is negotiated by the holder in some foreign country, it is conceivable even now that the validity of the transfer may be determinable by section 72 (1),³ or by section 72 (2),⁴ or by the law applicable to the transfer of *choses in possession*,⁵ or by the rules which govern the assignment of debts.⁶

Former
uncertainty
of the law

¹ See *infra*, pp. 662–3 et seqq. ² *Infra*, p. 475. ³ *Infra*, p. 473.

⁴ *Infra*, p. 474. ⁵ *Supra*, pp. 443 et seqq. ⁶ *Supra*, pp. 460 et seqq.

Trend of
authority
before Bills
of Ex-
change Act

Inland
bills

The cases which were decided before the Bills of Exchange Act appear to show, on the whole, that the question was determined by that system of law which regulates the original contract of the maker or the acceptor, according as the instrument was a promissory note or a bill of exchange. On principle this would seem to be the correct solution, and it is the one which has been suggested in the analogous case of debts.¹ It was supported by Lush J. with great cogency in *Lebel v. Tucker*.² A bill, which was drawn, accepted and payable in England, had been indorsed in France, and in an action brought here by the indorsee against the acceptor, the question was whether the validity of the indorsement fell to be determined by English or by French law. The decision was in favour of English law.

'Now,' said Lush J., 'the contract on which the present defendant, the acceptor, is sued, was made in England. The contract which the drawer proposes is this: He says: "Pay a certain sum at a certain date to my order." The acceptor makes this contract his own by putting his name as acceptor, and his contract, if expanded in words, is: "I undertake at the maturity of the bill to pay to the person who shall be the holder under an indorsement from you, the payee, made according to the law merchant." How can that contract of the acceptor be varied by the circumstance that the indorsement is made in a country where the law is different from the law of England?'³

Later he added:

'So here, the contract of the acceptor, having been made in England, must be governed by the English law. It would be anomalous to say that a contract made in this country could be affected by the circulation and negotiation in a foreign country of the instrument by which the contract is constituted.'⁴

Foreign
bills

This case dealt with an inland bill,⁵ but there were others decided before the Bills of Exchange Act which applied the same principle to the negotiation of foreign bills.⁶

¹ *Supra*, pp. 458-60, 466-8.

² *Lebel v. Tucker* (1867), L.R. 3 Q.B. 77. To the same effect was *De la Chaussette v. Bank of England* (1831), 2 B. & Ad. 385.

³ At p. 84.

⁴ At pp. 85-86.

⁵ i.e. one both drawn and payable within the British Isles, or drawn within the British Isles upon some person resident there. Any other bill is a foreign bill; Bills of Exchange Act, 1882, s. 4.

⁶ *Trimby v. Vignier* (1834), 1 Bing. N.C. 151; *In re Marseilles Extension Co.* (1885), 30 Ch.D. 598.

This principle, that the transfer of a negotiable instrument was governed by the 'proper law' of the acceptance or making, was abandoned for foreign bills by the majority of the Court of Common Pleas in the case of *Bradlaugh v. De Rin*,¹ where

Law altered by *Bradlaugh v. De Rin* for foreign bills

a bill of exchange, which had been drawn in France and accepted by defendant in England, was negotiated by a blank indorsement made in France.

Assuming that the indorsement was formally invalid by French law, the majority of the court held that the acceptor was free from liability, on the ground, it is generally said, that the indorsement of a foreign bill is governed by the law of the place, not where the bill is accepted, but where the indorsement is made.² The case was reversed by the Exchequer Chamber,³ but simply on a question of fact, for it appeared that the indorsement was valid even by French law.

It may be said, then, that except for the judgment of the Court of Common Pleas in *Bradlaugh v. De Rin* the stream of authority down to the Bills of Exchange Act, 1882, shows a marked tendency to determine the validity of an indorsement by the law which governs the original contract of the acceptor or maker.

Provisions of the Bills of Exchange Act

The relevant sections of the Bills of Exchange Act are as follows:

'72. Where a bill drawn in one country is negotiated, accepted or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance or indorsement or acceptance *supra protest*, is determined by the law of the place where such contract was made. Provided that—

(a) Where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.⁴

¹ (1868), L.R. 3 C.P. 538, Montague Smith J. dissenting.

² Westlake, s. 228; Sargant L.J. in *Koechlin et Cie v. Kestenbaum*, [1927] 1 K.B. 889, at p. 898. The truth would appear to be that French law was applied because the bill was *drawn* in France.

³ (1870), L.R. 5 C.P. 473.

⁴ It is also enacted by the Finance Act, 1933, s. 42, that a bill of exchange which is presented for acceptance, or accepted, or payable, outside the United Kingdom shall not be invalid by reason only that it is not stamped in accordance with the

(b) Where a bill issued out of the United Kingdom conforms as regards requisites in form to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra protest* of a bill is determined by the law of the place where such contract is made.¹

Effect of
the Act on
case law

The question now is whether these sections are concerned with the subject of transfer at all, and whether it is possible to ascertain from them the legal system that determines the validity and effect of an indorsement, or of a delivery, of a negotiable instrument.

There have been only three relevant cases since the Act.¹ The first of these was *Alcock v. Smith*.²

*Alcock v.
Smith*

Alcock v. Smith. A bill of exchange, drawn by and upon English firms, and payable in England to the order of *X*, was indorsed and delivered in Norway by *X* to *Y*. While in the hands of *Y* it was seized by a judgment creditor in Norway, and in the due course of Norwegian law was ultimately sold by public auction to *Z*. Owing to facts which have been omitted from the above statement, *Z* had no title to the bill by English law, but according to Norwegian law the property duly passed to him as a result of the sale. In the action subsequently brought in England, it was held that the effect of the transactions in Norway must be governed by Norwegian law, and therefore that the title acquired thereunder by *Z* must prevail over one which by English law would have been stronger.

The judgments paid little heed to the statutory provisions, but in general adopted the view that Norwegian law applied because it was the *lex loci actus*. Romer J., indeed, held that the word 'interpretation' in sub-section (2) was wide enough to cover the 'legal effect' of a contract and that therefore statutory effect had been given to the principle of the *lex loci actus*. In the Court of Appeal, however, no reliance was placed upon the Act.

law for the time being in force relating to stamp duties. Such bill may be received in evidence on payment of the proper duties and penalties under the Stamp Act, 1891, ss. 14, 15 (1). This is designed to give effect to the convention on Stamp Laws, 1930; see Cmd. 4594.

¹ *Alcock v. Smith*, [1892] 1 Ch. 238; *Embiricos v. Anglo-Austrian Bank*, [1904] 2 K.B. 870; [1905] 1 K.B. 677; *Koechlin v. Kestenbaum*, [1927] 1 K.B. 616; reversed, [1927] 1 K.B. 889.

² *Supra*.

The facts of the second case, *Embiricos v. Anglo-Austrian Bank*,¹ were these:

*Embiricos
v. Anglo
Austrian
Bank*

Embiricos v. Anglo-Austrian Bank. A cheque on a London bank was drawn in Romania in favour of the plaintiffs, who specially indorsed it there to a firm in London and placed it in an envelope addressed to that firm. The cheque was stolen from the envelope in Romania by a clerk of the plaintiffs. Three days later the cheque, bearing an indorsement which purported to be that of the London firm but which was in fact a forgery, was presented for payment at a bank in Vienna. The Vienna bank cashed the cheque in good faith, indorsed it to the defendants, who were their London agents, and the latter collected the amount from the bank upon which the cheque was drawn. Plaintiffs then sued defendants in damages for conversion. The Austrian law was that, notwithstanding the theft and forgery, the Viennese bank acquired a good title to the cheque. Judgment for defendants.

In this case the title which was acquired under the law of the country where the instrument was situated at the time of the transaction was upheld by the English court.

Again Austrian law was chosen as being the *lex loci actus* (though perhaps what was in the mind of the court was the *lex situs*, since this necessarily coincided with the *lex loci actus*),² and again the judgments attributed only trifling importance to the Act. Romer L.J. thought that section 72 (2) recognized the *lex loci actus* as being applicable to the matter, an opinion which Walton J. was prepared to share if 'interpretation' includes 'legal effect'. Vaughan Williams L.J. was not clear that the sub-section covered the case, but according to Stirling L.J. its applicability was worthy of serious consideration.

Little
effect in
*Embiricos
v. Anglo-
Austrian
Bank*

Section 72, which, it will be observed, was only a secondary consideration in these two decisions, played, however, a decisive part in *Koechlin v. Kestenbaum*,³ which is the most recent case on the subject.

Decisive
effect in
*Koechlin
v. Kesten-
baum*

In that case a bill of exchange was drawn in France by *X* upon the defendants in London to the order of *Y*, who was *X*'s father. It was accepted, payable in London, by the defendants. The bill was indorsed, not by the payee *Y*, but by *X*, and was then transferred for value to the plaintiffs in France. *X*'s indorsement was affixed on behalf of, and with the authority of, *Y*. Upon presentment the defendants refused payment, on the ground that the bill did not bear the signature of *Y* by way of indorsement.

English law requires that a bill payable to order shall be indorsed by the payee, or by an agent who expressly signs *per pro* the payee. French

¹ [1904] 2 K.B. 870; [1905] 1 K.B. 677.

² *Supra*, p. 442.

³ [1927] 1 K.B. 616; reversed, [1927] 1 K.B. 899.

law, however, permits a valid indorsement to be made by an agent in his own name, provided that he so acts with the authority of the payee.

Therefore, whether the plaintiffs were entitled to payment depended upon whether the validity of the indorsement was to be determined by English or by French law.

Rowlatt J.¹ held that the indorsement was governed by English law, but his decision was reversed by the Court of Appeal.²

Bankes L.J. held that the proper law to govern the validity of a transfer had been definitely settled by the Bills of Exchange Act, section 72, in favour of the *lex loci actus*. In his opinion this legal system was deliberately applied by the Court of Appeal in the *Embiricos Case* long after the passing of the Act. The bill, he said, was drawn and indorsed in France in a form recognized by French law, and therefore it became valid in England by virtue of sub-section (1) of section 72.³

Sargant L.J. agreed, the essence of his judgment being contained in the following words:

'In my judgment the question whether this bill could properly be indorsed in the name of the payee only, or could rightly be indorsed by the son in his own name, if he had authority in fact to do so, is purely a question of form and is therefore covered in terms by s. 72, sub-s. (1); but if it is not covered by that sub-section it is covered by sub-s. (2), in view of the very wide effect of the decision in *Embiricos v. Anglo-Austrian Bank*. . . If the indorsement in fact made is, according to the law of the place where it is made, sufficient to give a title to the indorsee, it appears to me that by the express terms of the Act the indorsee is entitled to sue. The effect is not to increase the liabilities of the acceptor, but merely to enlarge the methods by which the right to enforce those liabilities can be transferred by the person originally entitled to them to some subsequent indorsee.'

Avory J. expressed his agreement with the reasons thus given. This case is a definite authority in favour of the *lex loci actus*, though it is remarkable that it attributes to the judges who decided *Embiricos v. Anglo-Austrian Bank* a confidence in the applicability of the Bills of Exchange Act that is not very apparent from their judgments.

Summary of present law In finally stating the law with regard to the transfer of negotiable instruments we must first deal with the separate and special case of an inland bill of exchange.

Inland bills An 'inland bill' is one which is both drawn and payable within the British Isles, or one which is drawn within the

¹ [1927] 1 K.B. 616.

² [1927] 1 K.B. 889.

³ *Supra*, pp. 473-4.

British Isles upon some person resident there.¹ It is expressly provided by the Bills of Exchange Act, 1882,² that when such a bill is indorsed in a foreign country, the indorsement shall, *as regards the payer*, be interpreted according to the law of the United Kingdom. This confirms the decision in *Lebel v. Tucker*,³ and means that the acceptor of an inland as contrasted with a foreign bill is liable only to holders who claim under an indorsement valid by English law. The enactment, however, is expressly confined to the liability of the payer.

Secondly, we must contrast the transfer of a foreign bill, i.e. ^{Foreign bills} one which does not satisfy the definition given in the preceding paragraph. The rule here is that whether a transfer is valid or not is determined by the law of the place where the transfer is effected, i.e., in the words of the Act, 'where such contract is made'.⁴ This rule applies equally to a promissory note and to a cheque.⁵ The position was thus stated by Sargant L.J. in *Koechlin v. Kestenbaum*:⁶

"The decision of the Court of Common Pleas [in *Bradlaugh v. De Rin*]⁷ drew a marked distinction between a foreign bill, such as was there in question, and an inland bill, such as was being dealt with in *Lebel v. Tucker*,⁸ and it seems to me that the Legislature in 1882 adopted that view, and drew the marked distinction which had been thus recognized. . . . The result was that any one dealing with a foreign bill of exchange was in a less certain position than a person dealing with an inland bill, because in the case of an indorsement abroad on a foreign bill he might find substituted for the person to whom he was originally liable as acceptor, not merely a person to whom the transfer would have been good if made in England, but a person to whom the transfer by indorsement would be good if made according to the law of the country in which it was made. That is rendered perfectly clear by s. 72, sub-ss. (1) and (2), of the Act. The matter was carried probably further than was contemplated by the actual language of the sub-sections by the decision in *Embiricos v. Anglo-Austrian Bank*."

The result of this distinction is scarcely satisfactory to the commercial world, but it certainly shows how important it is that as wide a unification as possible of the internal laws relating to negotiable instruments should be effected.

¹ Bills of Exchange Act, 1882, s. 4.

² S. 72 (2) proviso.

³ (1867), L.R. 3 Q.B. 77; *supra*, p. 472.

⁴ Bills of Exchange Act, 1882, s. 72 (1) (2); *Embiricos v. Anglo-Austrian Bank*, [1904] 2 K.B. 870; [1905] 1 K.B. 677; *Alcock v. Smith*, [1892] 1 Ch. 238; *Koechlin v. Kestenbaum*, [1927] 1 K.B. 889.

⁵ *Embiricos v. Anglo-Austrian Bank*, *supra*.

⁶ [1927] 1 K.B. at p. 898.

⁷ *Supra*, p. 473.

⁸ *Supra*, p. 472.

(c) *Shares*

Importance of place where register kept A share of stock is intimately connected with the place where the issuing company has its residence, since the general rule is that it can be effectively transferred only by a substitution of the name of the transferee for that of the transferor in the register of shareholders. This register is normally kept by the company at its principal place of business, though there may be branch registers in other countries for the purpose of recording transactions that are effected there.¹ Despite the fact that a share is generally represented by a certificate which may be pledged and otherwise dealt with as a document of value, it still remains true that by English law entry on the register constitutes, and alone constitutes, legal ownership. The rule of private international law is that shares are deemed to be situated in the country where they can be effectively dealt with as between the shareholder and the company. In other words, shares which are transferable only by an entry in the register are deemed to be situated in the country where the register or branch register is kept.² If a company keeps registers in two or more countries, in any of which transfers may be registered, the question where any particular shares are situated depends upon the country in which according to the ordinary course of business the transfer would be registered.³

A question of choice of law may arise with regard to a transfer of shares. Foreign companies, for instance, frequently issue certificates which, according to the legal system that governs the incorporation of the company, can be transferred in such a manner that, even prior to registration, the transferee acquires, as against the transferor, both the legal and the equitable title to the shares. If, in such a case, the certificate is transferred in a country other than that in which the register of shareholders is kept, it becomes important to ascertain the country whose law will determine the validity and effect of the transfer.

¹ For instance, the Companies Act, 1948, s. 119, provides that an English Company may keep a branch register (called a dominion register) in any of Her Majesty's dominions for members there resident. No transaction affecting shares so registered must be registered in any other register; s. 120 (4).

² *London & South American Investment Trust v. British Tobacco Co. (Australia)*, [1927] 1 Ch. 107; *Brassard v. Smith*, [1925] A.C. 371; *Erie Beach Co. v. A.-G. for Ontario*, [1930] A.C. 161; *Baelz v. Public Trustee*, [1926] Ch. 863; *R. v. Williams*, [1942] A.C. 541.

³ *R. v. Williams*, *supra*; *Treasurer of Ontario v. Blonde and Others*, [1947] A.C.

English law is not doubtful in this matter. The effect of such a transfer may require consideration from two entirely different aspects, namely, first, its effect as against the company, and secondly, its effect as regards the parties to the transfer and persons claiming under them.

Rule where certificates transferred in other places

Questions of the first type are determined by the *lex situs* of the shares.

Effect of transfer as against the company

If, for instance, the certificates of an American company have been transferred in England, American law must decide whether the mode in which the transfer has been effected entitles the transferee to be registered as a shareholder. The corporate rights of the transferee depend entirely upon American law.

The second type of question, on the other hand, is determined by the proper law of the transaction, which in practically all cases will be the law of the place where the certificate has been delivered.

Effect of transfer as between the parties

‘On principle the transfer of the certificate is governed by the *lex situs* of the certificate at the material time, and the transfer of the shares is governed by the *lex situs* of the shares, and consequently if the certificate is transferred in country *X*, and the share registry office is situated in country *Y*, the law of *X* may give to the transferee of the certificate the property in the certificate (*jus in re*) and a right to registration as shareholder (*jus ad rem*), but the enforcement of his right to registration as shareholder and the vesting in him of the title to the share (*jus in re*) are subject to the law of *Y*.’¹

Thus, to take the illustration given above, the question whether the transferee is entitled by virtue of the transaction to retain the certificates as against the transferor must be determined by English law. If English law decides in favour of the transferee, then, whether he can demand to be registered as a shareholder is a matter for American law.

The authority for these rules is *Colonial Bank v. Cady*.²

Colonial Bank v. Cady

The executors of a deceased Englishman, owner of certain American railroad shares, who desired to be registered as owners in the books of the company, sent the certificates to London brokers for transmission to America. Upon the request of the brokers the executors signed the certificates in blank. The brokers deposited the certificates with the Colonial Bank as security for a debt, and later became bankrupt.

The question whether the deposit conferred a legal title upon the bank depended upon whether the transaction was to be

¹ Falconbridge, op. cit., pp. 500–1.

² (1890), 15 App. Cas. 267; in the Court of Appeal, *sub nom. Williams v. Colonial Bank* (1888), L.R. 38 Ch.D. 388.

governed by English or by American law. By English law no title passed, but by American law the delivery of the certificates operated to vest in the bank both the legal and the equitable ownership of the shares. It was held that, as the deposit was made in England, its effect must be determined by English law.

'I agree', said Lord Herschell, 'that the question, what is necessary or effectual to transfer the shares in such a company, or to perfect the title to them, must be answered by a reference to the law of the State of New York. But I think that the rights arising out of a transaction entered into by parties in this country, whether, for example, it operated to effect a binding sale or pledge as against the owner of the shares, must be determined by the law prevailing here.'¹

B. UNIVERSAL ASSIGNMENTS OF MOVABLES

I. BANKRUPTCY²

1. *Jurisdiction of English courts*

Two essentials Two conditions must be satisfied before an English court can exercise bankruptcy jurisdiction over a person: first, the person must have committed an 'act of bankruptcy' within the meaning of the Bankruptcy Act, 1914; and secondly, he must be a 'debtor' as defined by the same statute.

1. Act of bankruptcy It is not within our province to enumerate the eight facts any one of which constitutes an act of bankruptcy, but it is instructive to notice that some of them comprise acts which may occur in a foreign country. Thus it is enacted that a debtor commits an act of bankruptcy in the following cases:

- (a) If in England *or elsewhere* he makes an assignment of his property to a trustee for the benefit of his creditors generally.
- (b) If in England *or elsewhere* he makes a fraudulent conveyance of his property.
- (c) If in England *or elsewhere* he makes any conveyance which is void as a fraudulent preference.
- (d) If he departs *out of England*, or, *being out of England*, he remains *out of England*, or departs from his dwelling-house or otherwise absents himself with intent to defeat or delay his creditors.³

With regard to the first of these acts, however, it has been held that an assignment of property made by a domiciled foreigner in his own country and which is intended to operate according

¹ 15 App. Cas. at p. 283.

² For a more detailed account of this topic see Blom-Cooper, *Bankruptcy in Private International Law*.

³ Bankruptcy Act, 1914, s. 1 (1). Italics supplied.

to the law of that country is not an act of bankruptcy within the meaning of the statute.¹

The definition of the term 'debtor' in connexion with bankruptcy was considerably widened by the Bankruptcy Act, 1913,² in a section which has been reproduced in the present Act.³ Before 1913 it was held that the existing bankruptcy legislation was applicable only to British subjects, or to foreigners who, by residence in the country, brought themselves within the allegiance of the Crown.⁴ Legislation is *prima facie* territorial, and it was therefore established that bankruptcy jurisdiction could not be invoked against a foreigner unless the act of bankruptcy had been committed personally by him in England.⁵ The result was that a foreign merchant who, without ever coming to England, carried on a branch of his business here through an agent, was immune from the jurisdiction.⁶ The law, however, was altered by the statute of 1913, and the rule since then has been that a foreign national domiciled abroad may be susceptible to English proceedings even in respect of an act of bankruptcy committed abroad, as for example by remaining out of England with intent to defeat his creditors.⁷ The relevant section of the present Act provides that the expression 'a debtor' includes any person, whether a British subject or not, who at the time when any act of bankruptcy was committed by him,

- (a) was personally present in England; or
- (b) ordinarily resided or had a place of residence in England; or
- (c) was carrying on business in England, personally or by means of an agent or manager; or
- (d) was a member of a firm or partnership which carried on a business in England.⁸

Bank-
ruptcy Act,
s. 1 (2)

A debtor who has traded in England is deemed to be 'carrying on a business in England' even after he has left the country, until all debts due in respect of the trading have been paid.⁹

Bank-
ruptcy Act,
s. 4 (1) (d)
restricts
proceedings
by creditors

¹ *Ex parte Crispin* (1873), L.R. 8 Ch. 374, 380; *Cooke v. Charles A. Vogeler Co.*, [1901] A.C. 102; *In re Debtors*, [1936] Ch. 622.

² 3 & 4 Geo. V, c. 34, s. 8.

³ Bankruptcy Act, 1914, s. 1 (2).

⁴ *Ex parte Crispin* (1873), L.R. 8 Ch. 374; *Ex parte Blain* (1879), L.R. 12 Ch.D. 522; *In re Pearson*, [1892] 2 Q.B. 263.

⁵ *Ex parte Blain*, *supra*, at pp. 526, 528.

⁶ *Cooke v. Charles A. Vogeler Co.*, [1901] A.C. 102.

⁷ *Theophile v. Solicitor-General*, [1950] A.C. 186. On this case see Blom-Cooper, *op. cit.*, pp. 72 et seqq.

⁸ Bankruptcy Act, 1914, s. 1 (2).

⁹ *Theophile v. Solicitor-General*, *supra*.

It will be observed that this enactment, if it stood alone, would enable bankruptcy proceedings to be taken against a foreigner who committed an act of bankruptcy while on a merely transient visit to this country. Proceedings might also be taken if a foreigner, who happened to have a place of residence in England, were to commit an act of bankruptcy abroad. But since it would be undesirable to assume jurisdiction in such cases, the definition of debtor has been qualified by section 4 (1) (d). This section distinguishes bankruptcy proceedings initiated by the debtor himself from those initiated by a creditor, and it imposes further conditions applicable to the latter case only. It provides that:

A creditor shall not be entitled to present a bankruptcy petition against a debtor unless the debtor is domiciled in England, or *within the last year* has ordinarily resided or had a dwelling-house or place of business in England, or (except in the case of a person domiciled in Scotland or Ireland or a firm or partnership having its principal place of business in one of those two countries) has carried on business in England personally or by means of an agent or manager, or (except as aforesaid) is, or within the last year has been, a member of a firm or partnership which has carried on business in England by means of a partner, agent or manager.¹

The relation between sections 1 (2) and 4 (1) (d) seems reasonably clear.² Having first ascertained that the person against whom the jurisdiction is invoked is a 'debtor' within the meaning of the earlier section, the creditor must then have regard to the qualifications of that section introduced by 4 (1) (d).

A foreigner, for instance, not engaged in business, who fraudulently preferred one of his creditors while on a visit to London, would be immune from the bankruptcy jurisdiction of the English court, unless he was domiciled in England or within the last year had ordinarily resided in that country.

Again, a Scottish merchant, even though covered by section 1 (2) because trading in England through an agent, would be equally immune in the absence of an English domicil or residence.

Debtor's
bankruptcy
petition

The jurisdiction of the court is, however, wider when it is the debtor himself who initiates proceedings by the presentation of a bankruptcy petition. Such a petition is in itself an act of bankruptcy,³ and nothing more is required to found juris-

¹ Bankruptcy Act, 1914, s. 4 (1) (d).

² As to the interaction of the statutory provisions see 12 *M.L.R.* 462 et seqq. (Dr. K. Lipstein).

³ Bankruptcy Act, 1914, s. 1 (1) (f).

diction than that the petitioner should be a 'debtor' within the meaning of section 1 (2).

If the above conditions have been satisfied, the English court is not deprived of jurisdiction merely because bankruptcy proceedings have been initiated in a foreign country.¹ The Court of Bankruptcy has a discretion to refuse jurisdiction if an inequitable use is being made of the English statute,² but the existence of similar proceedings abroad is not of itself a valid reason for a refusal to exercise jurisdiction here. Jurisdiction, however, will be refused where an adjudication would be useless and embarrassing, as, for instance, where proceedings have been started abroad and there are no assets in England.³ The principle that English jurisdiction is not ousted by the mere existence of foreign proceedings would seem to apply, not only where the debtor himself has set the foreign court in motion, but also where the creditors have started proceedings abroad; though it must be observed that Warrington L.J. has suggested that there is a stronger ground for the ouster in the latter case.⁴

The matter just discussed brings us to the vexed question of concurrent bankruptcies.⁵ It is a matter of common occurrence for a debtor to be made bankrupt in more countries than one, and when this happens it is clear that there must inevitably ensue, not only considerable injustice and confusion, but also undue expense. The law of bankruptcy varies in different countries. Thus debts provable in one country may not be admissible of claim in another, the rules dealing with priority of creditors may differ, there may be no common agreement as to the date when the bankruptcy of a debtor is deemed to commence, and what constitutes an act of bankruptcy in one country may be innocuous in another. Quite apart from these differences in the substantive law of the various territorial systems, the inconveniences of co-existing bankruptcies are patent. The bankrupt, for instance, at his pleasure can remove his property and arrange for its distribution in one particular country, so that creditors will be compelled to calculate whether it is more advantageous to proceed in this or in that forum.⁶

¹ *In re McCulloch* (1880), 14 Ch.D. 716; *In re a Debtor*, [1922] 2 Ch. 470; *In re a Debtor*, [1929] 1 Ch. 362, 370. ² *In re McCulloch*, *supra*, at p. 719.

³ *In re Robinson* (1883), 22 Ch.D. 816.

⁴ *In re a Debtor*, [1922] 2 Ch. at p. 474.

⁵ See Westlake, pp. 162-71.

⁶ See Mr. Chancellor Kent in *Holmes v. Rensen* (New York), cited Piggott, *Foreign Judgments* (2nd ed.), p. 337.

Three courses possible in event of concurrent bankruptcies It is virtually impossible to prevent the initiation of bankruptcy proceedings in various countries, for there is invariably an overriding territorial rule that proceedings may be taken against a debtor in given circumstances, but the real problem is whether the different administrative bodies should co-operate with each other. The question arises when an application is made to an English court for the stay of proceedings in England on the ground that similar proceedings have been started abroad. In such a case there are three possible solutions:¹

(a) *Submission to the forum of the domicil.*

(a) Doctrine of the unity of bankruptcy Jurists have consistently advocated the doctrine of the unity of bankruptcy.

'As the bankruptcy has in view an adjustment of the claims of a number of creditors, it is possible only at one place, namely, at the domicil of the debtor. . . .'²

'Another rule', said Fry L.J.,³ 'which has been suggested is this, that every other *forum* shall yield to the *forum* of the domicil, that the *forum* of every foreign country, every country not of the domicil, shall act only as accessory and in aid of the *forum* of the domicil. That, it is said, is the *forum concursus*, to which all persons who are interested in the administration of the estate are bound to have recourse.'

Under such a system the administrator in the country of the domicil would seek the co-operation of administrators in every other country, so that the assets wherever situated would be removed to the domicil, where creditors of all countries would have to appear. Such co-operation, which was formerly recognized on the Continent, is not common at the present day.⁴ The obvious objection to it is that the domicil may not be the place where the debtor has carried on his main business or where his assets are mostly situated.

Unity of bankruptcy not recognized in England The doctrine of unity is certainly no part of English law. Though the theoretical convenience of submitting to the forum of the domicil has been judicially recognized,⁵ there is not a single case in which the court has stayed bankruptcy proceedings in England on that ground alone. There is, no doubt, jurisdiction to do so, but it is a jurisdiction which will not be exercised unless there is some other weighty reason, such as the absence of assets in England, for taking so drastic a step. On

¹ *In re Artola Hermanos* (1890), 24 Q.B.D. 640, at p. 648, *per* Fry L.J.

² Savigny, s. 374, transl. Guthrie, p. 209.

³ *In re Artola Hermanos*, *supra*, at p. 648.

⁴ Westlake, p. 163.

⁵ *In re Artola Hermanos*, *supra*, *per* Lord Coleridge, at p. 645.

the other hand, the court has a general jurisdiction to sanction an agreement between an English and a foreign trustee in bankruptcy, providing for the pooling of all assets and for their rateable distribution between the English and foreign creditors.¹

Again, the Bankruptcy Act, 1914, provides that all British courts, wherever situated, shall be auxiliary to each other.² If one British court requests the aid of another, the latter has full jurisdiction with regard to the matters forming the subject-matter of the request.

(b) Submission to the country in which proceedings are first started.

This rule of priority, which is that proceedings later in time must be used merely to assist the distribution of the estate by the administrator first appointed, has been described as the only logical conclusion to be drawn from the existing practice,³ but it has found no favour with English judges.⁴ If there is to be one principal administration, it ought to be either in the place where the assets are chiefly situated, or, in the case of a trader, in the place where the debtor has his chief business establishment, neither of which facts may be true of the country in which proceedings are first started. (b) Doctrine of priority

(c) Separate independent bankruptcies in each jurisdiction.

This is the principle to which English law is committed. The court, if once put in motion, administers such assets as are situated in England according to the rules set out in the Bankruptcy Act, without regard to administrations that may be in progress in other countries, though it recognizes the claims of all creditors, foreign as well as English.⁵ This does not mean, however, that the status of a foreign trustee in bankruptcy is disregarded. Though English law neglects the doctrine of unity it recognizes the doctrine of universality, that is, as we shall see below, it admits that the title of a foreign trustee extends to such movables of the debtor as are found in England, (c) Doctrine of plurality

¹ *In re P. Macfadyen & Co.*, [1908] 1 K.B. 675.

² S. 122.

³ Piggott, *Foreign Judgments* (2nd ed.), p. 337.

⁴ *In re Ariola Hermanos* (1890), 20 Q.B.D. 640, at p. 649.

⁵ So also in the case of concurrent liquidations of a company. Although the court will as far as practicable act as ancillary to the main liquidation, it will never 'give up the forensic rules which govern the conduct of its own liquidation', *In re English, Scottish, and Australian Chartered Bank*, [1893] 3 Ch. 385, 391, *per* Vaughan Williams J.; *In re Suidair International Airways Ltd.*, [1951] Ch. 165.

provided that no bankruptcy proceedings have been begun within the jurisdiction.

Winding-up of foreign companies. It is convenient here to consider the jurisdiction of English courts to wind up foreign companies.¹

Difficulties arising from dissolution of Russian companies Normally there can be no question of a foreign company being wound up in England, for its extinction, no less than its birth, is a matter solely for the law of the country in which it has been incorporated. Once dissolved according to this law it necessarily becomes a non-existent person in the eyes of the common law. As such, it can no longer sue or be sued or wound up, it cannot acquire rights or incur liabilities, and such assets as it possesses in England pass to the Crown as *bona vacantia*.² These disabilities, the inevitable consequences of inexistence, became of great importance after the Bolshevik revolution of 1917, for many of the Russian companies, particularly banking corporations, which had suffered dissolution and the confiscation of their assets at the hands of the Soviet authorities, continued to transact business at their branches in England. Such a branch represented what Maugham J. once expressively described as,

'a submerged wreck floating on the ocean of commerce.'³

At common law, debts due to or from the branch were irrecoverable, since it had no *locus standi* in the courts; its assets were neither distributable by a liquidator among creditors nor liable in respect even of transactions effected in England after and perhaps in ignorance of the dissolution, though the agent who had acted for this non-existent principal would no doubt be personally liable.

Statutory power to wind up foreign companies The cure for these ills, however, is to be found in the provisions of the Companies Act, 1948, which govern the winding-up of unregistered companies. The section now in force, i.e. section 399 (5) (A), provides that any unregistered company may be wound up at the discretion of the court, if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs.⁴ The expression 'unregistered company' includes *inter*

¹ This discussion owes much to the following articles written by Mr. Michael Mann: 15 *M.L.R.* 479-83; 18 *M.L.R.* 8-32; 3 *I. & C.L.Q.R.* 689-92; 4 *I. & C.L.Q.R.* 226-8.

² *In re Wells (Sir Thomas Spencer)*, [1933] Ch. 29.

³ *In re Russian Bank for Foreign Trade*, [1933] Ch. 745, 764.

⁴ The corresponding section in the Act of 1929 was 338 (1) (d).

alia 'any partnership, whether limited or not, any association and any company', but not, of course, a company registered in the United Kingdom or a limited partnership registered in England or Northern Ireland.¹ The expression is thus given a comprehensive meaning, and it includes 'countless cases of partnerships, associations and companies which are merely names for groups of individuals and which are not corporations at all'.² It does not refer in terms to foreign corporations, but nevertheless it is well settled that they may be wound up under the statutory provisions.³ The Act expressly provides that an unregistered company may be wound up if it *is dissolved*,⁴ and since these words have been construed as equivalent to *has been dissolved*,⁵ it follows that the English branch of a Russian bank dissolved many years ago is subject to this particular jurisdiction of the High Court upon the petition either of the branch itself or of a creditor.

In order to invoke the jurisdiction conferred by section 399 (5) (A) of the Act, it is not necessary to show that the dissolved company had established a definite branch or place of business in England.⁶ Since the object of the section is to provide machinery whereby any assets found in the country may be collected and distributed among the creditors, it follows that the existence of such assets, which at any rate implies the carrying-on of business in some sense of the term, is sufficient to justify the making of a winding-up order.

The difficulties caused by the revolutionary legislation in Russia prompted the insertion of an additional section in the Companies Act, 1929, which now appears as section 400 in the Act of 1948.⁷ It is to this effect:

Companies
Act, 1948
s. 400.

Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company under this part of the Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated.

¹ Companies Act, 1948, s. 398.

² *Russian & English Bank v. Baring Bros. & Co.*, [1936] A.C. 405, 432, *per* Lord Russell of Killowen.

³ *In re Commercial Bank of South Australia*, [1892] 2 Ch. 204.

⁴ Companies Act, 1948, s. 399 (5) (A).

⁵ *Re Family Endowment Society* (1870), L.R. 5 Ch. 118, 136.

⁶ *Banque des Marchands de Moscou v. Kindersley*, [1951] Ch. 112; *In re Axoff-Don Commercial Bank*, [1954] Ch. 315.

⁷ The corresponding section in the Act of 1929 was 338 (2).

The prevalent view is that the section merely confirms a jurisdiction that has long existed and removes any possible doubts as to its exercise in the case of such associations as the Russian banks.¹ In particular, its reference to 'carrying on business' in Great Britain imposes no limitation upon the general jurisdiction conferred by section 399 (5) (A).² In effect the words only indicate that some assets upon which a winding-up order can operate must be found in Great Britain.

Revivification of company for purposes of winding-up

This spectacle of winding-up an extinct entity is bound to disturb the logician. He may justifiably ask several questions. How can you liquidate a body that has already been annihilated, unless it has been expressly reanimated by the Act, which is not in fact the case? Since all the assets of a dissolved corporation pass to the Crown as *bona vacantia*, what remains to be distributed among the creditors? Who are the creditors, what are the debts, for it is well settled that debts due to or from a corporation are extinguished on its dissolution?³ In the leading case of *Russian and English Bank v. Baring Brothers & Co.*,⁴ the House of Lords by a bare majority⁵ surmounted these difficulties by holding that a dissolved company is implicitly revived by the Act for winding-up purposes. In the words of Lord Atkin:⁶

'The legislature has provided that a dissolved foreign corporation may be wound up in accordance with the provisions of the Companies Act. The provisions of the Companies Act as to winding-up are only applicable to corporations which are in existence. Are we to say that the legislative enactment is completely futile: or is there another solution? My Lords, I think that we are entitled to imply, indeed I think it is a necessary implication, that the dissolved foreign company is to be wound up *as though it had not been dissolved*,⁷ and therefore continued in existence.'

Effect of revivification

Since, therefore, the company is revived in the eyes of English law, the liquidator may bring actions on its behalf,⁸ and its assets, being no longer ownerless, do not pass to the Crown as *bona vacantia*,⁹ except in so far as there is a surplus remaining

¹ *Russian & English Bank v. Baring Bros. & Co.*, [1936] A.C. 405, at p. 424, per Lord Atkin.

² *Banque des Marchands de Moscou v. Kindersley*, [1951] Ch. 112, 131.

³ 1 Blackstone's Commentaries, p. 484, cited in *In re Higginson & Dean*, [1899] 1 Q.B. 325, 330.

⁴ [1936] A.C. 405.

⁵ Lords Blanesburgh, Atkin, and Macmillan.

⁶ At p. 427.

⁷ Italics supplied.

⁸ *Russian & English Bank v. Baring Bros. & Co.*, [1936] A.C. 405.

⁹ *In re Azoff-Don Commercial Bank*, [1954] Ch. 315.

after payment of all liabilities.¹ The doctrine or pretence of revivification, in fact, means that the dissolution, but the dissolution alone, is to be ignored.² The results caused solely by the dissolution are reversed. Thus, for example, a creditor may prove for a debt which is recoverable and therefore situated in England, but not for one which is situated in Russia and which has for some reason such as illegality or confiscation been extinguished by Russian law.³ In such a case the annihilation of the debt is not due solely to the dissolution of the corporate debtor.

A question upon which two judges have differed⁴ is whether debts alleged to have been contracted in the interregnum between the dissolution of the company and the order for winding-up can rank for payment, since the logical difficulty again arises that the non-existent company was at that time incapable of entering into binding transactions. The point arose in a recent case where it is respectfully submitted that Wynn-Parry J. reached the correct solution by carrying the doctrine of revivification to its logical conclusion and holding that the dissolution of the company before the creation of the debt must be ignored.⁵ In an earlier case, however, which was not brought to the notice of the learned judge, Vaisey J. had reached the opposite conclusion.⁶

Recovery
of post-
dissolution
debts

2. *Effect in England of a foreign adjudication in bankruptcy*

In considering the extent to which a foreign adjudication (or some analogous process) operates in England it is necessary to notice that adjudications in Scotland,⁷ Northern Ireland⁸ and Eire⁹ stand in a somewhat different position from those in other countries, since they derive universal effect from imperial statutes.¹⁰ The title of a trustee appointed in any one of these

Effect
of certain
imperial
statutes

¹ *In re Banque Industrielle de Moscou*, [1952] Ch. 919.

² 3 *I. & C.L.Q.R.* 691.

³ *Re Banque des Marchands de Moscou* (No. 2), [1954] 1 W.L.R. 1108; [1954] 2 All E.R. 746.

⁴ Vaisey J. in *Re Banque des Marchands de Moscou, Wilenkin v. The Liquidator*, [1952] 1 All E.R. 1269; Wynn-Parry J. in *In re Russian Commercial and Industrial Bank*, [1955] Ch. 148.

⁵ *In re Russian Commercial and Industrial Bank*, *supra*.

⁶ *Re Banque des Marchands de Moscou, Wilenkin v. The Liquidator*, [1952] 1 All E.R. 1269.

⁷ Bankruptcy (Scotland) Act 1913, s. 97.

⁸ Bankruptcy and Insolvency (Ireland) Act, 1857, ss. 267, 268.

⁹ The Act cited in note 8 *supra* still applies to Eire.

¹⁰ Dicey, p. 437, Rule 97.

countries extends not only to the movables of the debtor but also to his immovables, no matter where they may be situated.

Extent of foreign trustees' title With regard to adjudications in countries to which no imperial statute applies, the question is whether the status of a foreign trustee is so far recognized by English law that he acquires a title to the bankrupt's property in England. Does the assignment of the bankrupt's property which has been made to the trustee by the foreign law under which he has been appointed entitle him to the English property, or is it necessary that there should be an independent adjudication in this country? The laws of England and of the United States of America are different on this matter.

American rule The doctrine of *territoriality* prevails generally in America. This is that an assignment under a State insolvency law operates only upon property within that State, so that the title acquired by the trustee is of no avail against creditors who attach property under the law of another State where it is actually situated.¹

English law adopts doctrine of universality The English courts, on the other hand, have consistently applied the doctrine of *universality*, according to which they hold that all *movable* property, no matter where it may be situated at the time of the assignment by the foreign law, passes to the trustee.² Thus the trustee can recover movables, including *choses in action*, found in England, and his title is not displaced if a creditor, after commencement of the bankruptcy, attaches property of the debtor by process of law in England. This doctrine is of ancient origin. In *Solomons v. Ross*,³ in 1764,

X & Co., Dutch merchants, were declared bankrupt on 2 January and *Y* was appointed curator of their property by the Chamber of Desolate Estates in Amsterdam. Previously, on 20 December, *Z*, an English creditor of *X & Co.*, had attached £1,200 in the hands of *A* which was due from *A* to *X & Co.* In March *Z* obtained judgment by default on the attachment, whereupon a writ of execution issued against *A*. Being unable to pay, *A* gave *Z* a promissory note for the amount of the judgment. In proceedings brought by the curator, *Y*, it was held that *A* must pay the £1,200 to *Y*, and that the execution creditor, *Z*, must surrender the promissory note to *A*.

¹ *Security Trust Co. v. Dodd Mead & Co.* (Supreme Ct. U.S.A.), 1899; Lorenzen, p. 911. It has been doubted, however, whether this is true since the American Bankruptcy Act, 1898; Nadelmann in 59 *Harvard L.R.* 1027.

² *Solomons v. Ross* (1764), 1 H.Bl. 131 (N); *Jollett v. Deponthieu* (1769), 1 H.Bl. 132 (N); *Alivon v. Furnival* (1834), 1 C.M. & R. 277.

³ 1 H.Bl. 131 (N). For a full account and an evaluation of the case see K. H. Nadelmann in 9 *M.L.R.* 154, who refers to another and a fuller report in Wallis's *Irish Chancery Reports* (1839), p. 54.

It was emphasized in the judgment, at least in one report of the case,¹ that Dutch law, in the event of a Dutch bankruptcy, permitted foreign creditors to share the assets equally with local creditors. It is not certain, therefore, that the English court would follow the decision if the trustee were appointed in a country such as Argentina where there is discrimination against foreign creditors.²

The courts, however, have not accepted the suggestion made in the decision that the title of the foreign trustee overrides encumbrances already acquired by third parties over property of the debtor situated in England. If, for instance, *X* obtains a garnishee order attaching a debt owed in England by *A* to *B* and *B* is later declared bankrupt abroad, the attachment ranks prior to the title of the foreign trustee.³

'In each case the question will be whether the bankrupt could have assigned to the trustee at the date when the trustee's title accrued, the debt or assets in question situated in England.'⁴

The question that arises is—What is meant by a 'foreign trustee'? The original rule probably was that, for the doctrine of universality to apply, the trustee must be a person appointed by the *lex domicilii* of the debtor. The very principle, indeed, upon which the doctrine was based found its justification in the conception of domicil. The argument was that movable property, having no locality, was subject to the law of the owner's domicil. Since a voluntary assignment valid according to the owner's *lex domicilii* was supposed to be effective everywhere, it was said that an involuntary assignment under the bankruptcy laws of that domicil must of necessity be equally effective.⁵ The modern cases, however, establish that a foreign trustee need not derive his title from the *lex domicilii* of the debtor in order to substantiate his claim to English movables. Perhaps, all that can be said positively is that it is sufficient if the debtor was 'properly subject'⁶ to the jurisdiction of the courts of the country in which he has been made bankrupt, though it has been objected with some force that this is to beg the question.⁷

Foreign trustee must be appointed in proceedings to which debtor is a party

¹ The Irish report mentioned in the last note.

² 9 *M.L.R.* 163 et seqq.

³ *Galbraith v. Grimshaw*, [1910] A.C. 508; *Singer & Co. v. Fry* (1915), 84 L.J. (K.B.) 2025. *Anantapadmanabhaswami v. Official Receiver of Secunderabad*, [1933] A.C. 394.

⁴ *Galbraith v. Grimshaw*, *supra*, at p. 511, *per* Lord Loreburn.

⁵ Story, s. 404.

⁶ Dicey, p. 440, Rule 99.

⁷ Blom-Cooper, *op. cit.*, p. 91.

It may be that the possession by the debtor of assets in the country of adjudication will entitle the trustee to claim movables in England.¹ What is certain is that he will be able to do so if the debtor has been a party to the foreign proceedings in which the adjudication order was made.² In the case of *In re Anderson*:³

A domiciled Englishman, who was entitled to a reversionary interest in English money, was adjudicated bankrupt in New Zealand in proceedings to which he was a party. By an oversight, the reversionary interest was not disclosed in the New Zealand proceedings. Six years later the debtor was declared bankrupt in England.

It was held that the New Zealand trustee, despite the fact that he was not appointed in the debtor's domicile, was entitled to the reversionary interest as against the English trustee.

'Therefore, I think,' said Phillimore J., 'upon principle and authority, that the adjudication in New Zealand, being a valid adjudication according to the law of New Zealand, passed the right to movable property of the bankrupt in any country to his official assignee in bankruptcy in New Zealand. If he had not been a party to the adjudication, if it had been made against him in his absence, other considerations might very well have applied.'

English
immov-
ables

The principle of universality does not apply to immovables, but the English court may, in the exercise of its discretionary jurisdiction, permit a foreign curator or trustee to sell land situated in England for the benefit of the bankrupt owner's creditors.⁴

3. *Effect of an English adjudication*

The Bankruptcy Act, 1914,⁵ provides that the property of a bankrupt upon adjudication shall pass to his trustee in bankruptcy, and by a later section⁶ 'property' is made to include:

'Money, goods, things in action, land, and every description of property whether real or personal and *whether situate in England or elsewhere*. . . .'

¹ Blom-Cooper, *op. cit.*, p. 92.

² *In re Davidson* (1873), L.R. 15 Eq. 383; *In re Lawson's Trusts*, [1896] 1 Ch. 175; *In re Anderson*, [1911] 1 K.B. 896; *In re Craig* (1916), 86 L.J. (Ch.) 62; *Bergerem v. Marsh* (1921), 151 L.T. 264. For the abandonment of the theory that bankruptcy in the debtor's domicile was essential see Raeburn in 26 *B.Y.B.I.L.* 189 et seqq.

³ [1911] 1 K.B. 896.

⁴ *In re Kooperman*, [1928] W.N. 101.

⁵ S. 53.

⁶ S. 167.

With regard to the effect of such an adjudication in Scotland and Ireland, it is provided that any order made by an English Court of Bankruptcy shall be enforced in Scotland and Ireland (including now Eire) in the same manner in all respects as if the order had been made by the Court required to enforce it.¹

Effect in
Scotland
and
Ireland

Quite apart from the special cases of Scotland and Ireland, it will be noticed that the Act expressly and deliberately attributes a very extensive effect to an English adjudication. Not only movables, but even immovables, belonging to the debtor, 'whether situate in England or elsewhere', are to pass to the trustee. Despite the intention of the Act, however, it is obvious that a distinction must be drawn between countries forming part of the dominions of the Crown and other foreign countries.

Effect
in other
countries

With regard to the former, the judicial view is that the Bankruptcy Act is an imperial statute which operates to vest in the trustee all property that the debtor may own in any of the dominions of the Crown.² Notwithstanding the criticism of Westlake,³ this view would appear to represent the effect in law of the statute, for in theory, at any rate, it is undoubted that Parliament may pass an Act to bind all parts of the Empire, subject, however, to the power of repeal given by the Statute of Westminster, 1931, to Dominion Parliaments.

British
foreign
countries

The question, however, is for the most part of academic interest as regards non-British foreign countries. Whatever may have been the intention of the Legislature in passing the Bankruptcy Act, it is clear that an English adjudication cannot of its own force have any effect upon property situated in, say, France or Germany. The effect can be only that which is permitted by the local law. It is true that if the debtor is present in England he may be compelled to render his foreign property available for the creditors, since the Act expressly provides that:

Non-
British
foreign
countries

'He shall execute such powers of attorney, conveyances, deeds, and instruments, and generally do all such acts and things in relation to his property . . . as may be reasonably required by the . . . trustee.'⁴

Nevertheless there is one type of case in which the operation upon foreign property of an adjudication becomes of great practical importance, and in which the theory that the Bankruptcy Act embraces property wherever situate demands

Is credi-
tor who re-
covers debt
abroad
liable to
account to
English
trustee?

¹ S. 121; S.R. & O. 1923, No. 405.

² *Callender, Sykes & Co. v. Colonial Secretary of Lagos*, [1891] A.C. 460, 467; a decision upon the Act of 1869.

³ S. 137.

⁴ S. 22 (2).

consideration. This is where a creditor recovers payment abroad from a debtor who has previously been made bankrupt in England. Can the English court make such a creditor disgorge what he has obtained? It is clear that the court is powerless if the creditor remains abroad, but what if he should be found in England?

The hotch-
pot rule

In this connexion one rule is clearly established, namely, that a creditor, whether an alien or a British subject, will not be allowed to prove in the English bankruptcy for any further debts unless he brings into hotchpot what he has already recovered abroad.¹ This was made clear by Lord Cairns in *Banco de Portugal v. Waddell*:²

'A person who, after having proved under a foreign bankruptcy, claims to prove in a bankruptcy of the same debtors in England, may do so; but he must do so upon the terms of bringing in, for the purpose of dividend, the sum which he has received abroad. As was said by Lord Eldon,³ "It has been decided that a person cannot come in under an English commission without bringing into the common fund what he has received abroad"; and Lord Eldon goes on to point out, what is obviously the case, that a creditor, because he happened personally to be in England, would not be obliged to bring this sum into the common fund—he might keep it if he liked—he might ignore the English bankruptcy proceeding altogether if he pleased; but if he did not ignore it, if he sought to take advantage of it . . . , then, on the principle that he who asks for equity must do equity, he must bring into the common fund that which he had already received in respect of the obligations of the same debtors.'

Position
of creditor
who takes
no part in
English
proceedings

So far the law is clear. The difficult question remains, however, whether a creditor who has obtained payment abroad, whether by action or not, and who does not seek to participate in the English bankruptcy, can be made to disgorge what he has recovered, on the ground that he has diminished the fund available for the general body of creditors. In the passage cited above Lord Cairns, ostensibly quoting Lord Eldon, intimated that no such action would lie against the creditor, but it is doubtful whether he correctly interpreted the view of Lord Eldon. That learned judge admitted that the creditor could not be compelled to *prove* in the English bankruptcy, but he went on to observe that whether the trustee could 'by law in another

¹ *Ex parte Wilson* (1872), L.R. 7 Ch. 490; *Banco de Portugal v. Waddell* (1880), L.R. 5 App. Cas. 161.

² (1880), L.R. 5 App. Cas. at p. 167.

³ *Selkrig v. Davis* (1814), 2 Dow. 230, 249.

form' get the property out of the creditor's hands was a different question.

There are three cases, all decided between 1791 and 1795, *Sill v. Worswick*; ¹ *Worswick v. Hunter*; ² *Potts*; ³ and *Phillips v. Hunter*.³

In *Sill v. Worswick*, *X*, a domiciled Englishman, was adjudicated bankrupt at Lancaster, Sill being appointed trustee. Worswick, another domiciled Englishman, after and with full knowledge of the bankruptcy, made an affidavit before the Mayor of Lancaster of *X*'s indebtedness to him, and on the strength of this brought an action in the British West Indies against a person who held certain moneys of *X*, and recovered in full the debt which was due to him from *X*.

It was held that the trustee could recover the amount in an action for money had and received.

The greater part of Lord Loughborough's judgment is occupied with showing that, since movable property is subject to the *lex domicilii* of the owner, an adjudication made in the country of that domicil embraces property in any part of the world. This principle does not carry us far, for the problem is to discover the circumstances in which a creditor who has acted in disregard of it can be compelled to disgorge. Upon this, which is the sole issue of the case, the learned judge lays down a proposition which, he says, is too clear to require any discussion, namely, that a creditor, resident in England and therefore subject to the jurisdiction of the English court, cannot avail himself of a process which he has commenced in England so as to retain his debt against the trustee.

Basis of the decision was the English residence of the creditor

The facts which make it difficult to extract a general principle from this decision are that the diligent creditor started his proceedings for recovery in England, and also that the place of final recovery was within the dominions of the Crown. The crucial factor was the English residence of the creditor. Had he been resident in the West Indies, Lord Loughborough clearly intimated that the trustee would have had no right of action.

'I do not wish to have it understood that it follows as a consequence from the opinion I am now giving (I rather think that the contrary would be the consequence of the reasoning I am now using) that a creditor in that country, not subject to the bankrupt laws nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt.'

This seems to have been decided in *Waring v. Knight*.⁴

¹ (1791), 1 H.Bl. 665.

² (1791), 4 T.R. 182.

³ (1795), 2 H.Bl. 402.

⁴ See 2 H.Bl. 413.

In *Hunter v. Potts*,¹

Hunter v. Potts also based upon residence

the creditor and the bankrupt were both resident in England. After the bankruptcy and with knowledge of it, the creditor instructed his attorney in America to attach the effects of the bankrupt in Rhode Island. The attorney attached in the regular way certain money in the hands of *X* which was due to the bankrupt, and later obtained in the Court of Common Pleas at Rhode Island judgment against the bankrupt for £496. 12s. 9d., which sum he remitted to the creditor in England.

The King's Bench held that the trustee was entitled to recover this sum in an action for money had and received.

Lord Kenyon, in delivering the judgment of the court, is at pains to demonstrate why the English adjudication must pass the property in Rhode Island to the trustee, but the true ground of the decision is indicated in the following sentence:

'For it must be remembered that during the progress of this business all these parties resided in England; that the defendant, knowing of the commission and of the assignment, in order to gain a priority, transmitted an affidavit to Rhode Island to obtain an attachment of the bankrupt's property there, in violation of the rights of the rest of the creditors, which were then vested; but such an attempt cannot be sanctioned in a court of law.'

Phillips v. Hunter

The head-note to the report of *Phillips v. Hunter*² is as follows:

All parties subject to English law

'*A, B, and C* being partners in trade in England, *A* and *B* reside in England and *C* goes to a foreign country for the purpose of managing the concerns of the house in that country. *D* is also resident in England, where a debt is contracted by *D* to *A, B, and C*. Later, *D* becomes insolvent, and *C*, knowing that *D* has stopped payment, and after a commission of bankruptcy has in fact issued against *D*, attaches in the names of himself and his partners a debt due to *D* in the foreign country by legal process, and obtains payment of it under judgment of a Court of justice of that country.'

On these facts the Exchequer Chamber held by six judgments to one, there being a trenchant dissenting judgment by Eyre C.J., that the English trustee was entitled to recover the money in an action against *A, B, and C* for money had and received. The gist of the judgments of the majority is deducible from the following sentences:³

'It must be remembered that . . . the bankrupts were English traders, that the defendants were partners in an English house, that the debt

¹ (1791), 4 T.R. 182. ² (1795), 2 H.Bl. 402. ³ pp. 404-5.

from the bankrupts to the defendants was contracted in England, that the bankrupts as well as the defendants were resident in England, and that C, who must also be taken to be an English subject, went from this kingdom to America, for the special and temporary purpose of transacting business for the English house in which he continued to be a partner. All these facts appearing . . . this case must be argued as arising between English subjects upon English property. . . . When the debt, therefore, was contracted, all the parties were as much subject to the bankrupt laws as to the other laws of England under which they lived.'

In a later part of the judgment it is said that if a debtor's foreign property could be obtained by a creditor's *going from hence for that purpose*, the result would be damaging to the credit of the debtor in England.

It is submitted that the true principle deducible from the authorities is a very simple one, namely: Is the creditor subject to the English bankruptcy law or is he not? If he is subject to the jurisdiction of the English Court of Bankruptcy, he is liable to refund what he has recovered abroad; if not subject to the jurisdiction he is immune from liability, unless, of course, he seeks to prove in the bankruptcy.¹ But though the principle submitted is a simple one, its defect perhaps is the difficulty of defining with precision what is meant by subjection to the English bankruptcy jurisdiction. According to the doctrine of effectiveness, jurisdiction can in general be exercised against any person upon whom, owing to his presence in England, a writ of summons can be served. It may be asked, therefore, whether a creditor, who has obtained payment in full abroad of a debt due to him from an English bankrupt and who is at the moment in England, can be sued for refundment by the trustee on the ground that his presence here renders him amenable to the jurisdiction. This argument is untenable. It is bankruptcy jurisdiction, not jurisdiction in general, that has to be considered. It is the time of receipt of payment, not the time of the action for refundment, that is material. If bankruptcy jurisdiction cannot be exercised against a *debtor*, despite his presence in England, unless one of the conditions specified in section 4 (1) (d) of the Act² is true of him, it would seem to follow that the jurisdiction cannot be exercised against a *creditor* unless the same conditions are applicable to him at the time when he receives the payment. Logically, it is difficult to believe that

True test would seem to be whether creditor is subject to English bankruptcy jurisdiction

¹ For the position in the Americas see Nadelmann, 96 *Pennsylvania Law Review*, 171 et seqq.

² *Supra*, p. 482.

the court possesses a wider jurisdiction over a creditor than over a debtor against whom an adjudication order is sought.¹

4. *Administration in bankruptcy*

Lex fori governs We have already noticed that a foreigner is entitled to prove in an English bankruptcy even though the debt which he claims was contracted abroad. He is, however, in exactly the same position as English creditors with regard to all matters that concern the administration of the estate. The duty of the trustee is to distribute the estate among all creditors, whether English or foreign, but all questions arising in connexion with the distribution fall to be decided by English law as being the *lex fori*. The law which distributes the assets must necessarily regulate the manner and course of distribution.

Examples Thus, whether a debt is admissible of proof,² whether a creditor of a partnership can prove against the separate estate of an individual partner,³ whether a foreign creditor who proves in the bankruptcy can be compelled to restore property which he has improperly obtained from the debtor,⁴ and questions of priority of payment,⁵ are all matter that must be governed by the *lex fori*.⁶

5. *Discharge*

Since the effect of a discharge in bankruptcy is to free the debtor from liabilities incurred prior to the order of discharge, it is important to know whether a discharge in one country is an effective plea in another. Where must the order of discharge be made in order to have universal effect? The answer that English law makes to this question depends upon whether or not the order is made under the provisions of an imperial statute.

Effect of discharge in British dominions If the bankruptcy occurs in England,⁷ Ireland⁸ or Scotland,⁹ any order of discharge that is made prevails throughout the

¹ See also Dicey, p. 331, note 28; Blom-Cooper, op. cit., pp. 130 et seqq.

² *Ex parte Melbourn* (1870), L.R. 6 Ch. 64.

³ *Brickwood v. Miller* (1817), 3 Mer. 279; cp. *In re Doetsch*, [1896] 2 Ch. 836.

⁴ *Ex parte Robertson* (1875), L.R. 20 Eq. 733.

⁵ *Thurburn v. Steward* (1871), L.R. 3 P.C. 478.

⁶ As to the difficulty of distinguishing between administration, i.e. procedure, and substance see Blom-Cooper, op. cit., pp. 141 et seqq.

⁷ Bankruptcy Act, 1914.

⁸ Bankruptcy and Insolvency (Ireland) Act, 1857.

⁹ Bankruptcy (Scotland) Act, 1913.

dominions of the Crown, no matter what may be the proper law of the transaction under which the cause of action arose.¹

'Where the discharge', said Bovill C.J., 'is created by the legislature or laws of a country which has a paramount jurisdiction over another country in which the debt or liability arose, or by the legislature or laws which govern the tribunal in which the question is to be decided, such a discharge may be effectual in both countries in the one case, or in proceedings before the tribunal in the other case. This is only consistent with justice in the case of bankruptcy, as the debtor is thereby deprived of the whole of his property wherever it may be situate, subject to the special laws of any particular country which may be able to assert a jurisdiction over it.'²

Where, however, no imperial statute is applicable, as, for example, where a debtor is discharged in France, everything depends upon the law that governs the obligation.³ If the order of discharge is made under that law which is the proper law governing the debt or other liability in question, it is effective in England;⁴ if made under any other law, it is ineffective in England.⁵ A discharge by the proper law is a discharge everywhere. Thus in *Gardiner v. Houghton*:⁶

Effect of discharge made in foreign countries

Discharge effective if made under the 'proper law' of the obligation

It was pleaded to an action for money had and received that the debt was contracted in Victoria while the defendant was resident there, and that he was subsequently discharged from the debt under the insolvency laws of that colony. The replication to the plea was that when the debt was contracted the plaintiff was resident at Liverpool; and that defendant was now resident in England, and that the debt ought to have been paid in England.

It was held that the replication showed no answer, for it admitted that the contract was made in Victoria and it did not aver that the debt was payable only in England. In other words, it did not disprove that Victorian law was the proper law of the debt.

That a discharge under some law other than the proper law is devoid of extra-territorial effect is well illustrated by *Gibbs & Son v. Société Industrielle*.⁷

Discharge ineffective if not made under the 'proper law'

In that case the defendants, a French company, made a contract through their London broker for the purchase of copper from the

¹ Dicey, p. 404.

² *Ellis v. M'Henry* (1871), L.R. 6 C.P. 228, 234-5; and see the authorities there cited.

³ Westlake, s. 240.

⁴ *Ellis v. M'Henry*, *supra*, at p. 234 and authorities there cited.

⁵ *Gibbs v. Société Industrielle* (1890), 25 Q.B.D. 399; *Smith v. Buchanan* (1800), 1 East 6. ⁶ (1862), 2 B. & S. 743. ⁷ (1890), 25 Q.B.D. 399.

plaintiffs, London merchants. The contract, besides being made in London, was expressed to be subject to the rules of the London Metal Exchange; delivery was to be at Liverpool; and payment was to be made in cash in London. It was therefore an English contract. In an action brought for non-acceptance of the copper, the defendants pleaded that by a judgment of a French court they had been pronounced to be in judicial liquidation. Assuming that by French law this pronouncement discharged the defendants from all liability under the contract, the question was whether it had the same effect in England so as to bar the plaintiffs' right to sue here.

The argument for the defendants was based on the French domicile of the company. It was said that when a debtor is domiciled in a foreign country and made bankrupt there, then any rule of the foreign bankruptcy law which prevents actions from being maintained against the debtor is recognized in England. This argument did not prevail and judgment was entered for the plaintiffs. Lord Esher, after pointing out that a contract is governed by its proper law, dealt as follows with the contention that the *lex domicilii* ought to be regarded:¹

'The law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound. As Lord Kenyon said in *Smith v. Buchanan*,² it is sought to bind the plaintiffs by a law with which they have nothing to do, and to which they have not given any assent either express or implied.'

II. ASSIGNMENT ON MARRIAGE

Problem
to be
discussed

The problem that confronts us here is to ascertain what system of law regulates the rights of a husband and wife in the movable property which either of them may possess at the time of marriage or may acquire afterwards. Important consequences may ensue according as this or that law is chosen. For instance, the result of choosing one particular legal system may be that the property of the wife passes entirely to the husband, as was substantially the case in England prior to 1883. Again, if an Englishwoman marries a Dutchman and Dutch law is regarded as the governing system, it may be that the parties became subject to *communauté des biens* under which everything that belongs to either spouse at the time of marriage or that is acquired by either afterwards is owned by them

¹ 25 Q.B.D. at p. 406.

² (1800), 1 East 6.

jointly. They become co-owners of everything by the mere fact of marriage.¹

The primary rule is that the effect of marriage upon the proprietary rights of the parties in movables is determined by the law of the husband's domicile.² In the words of Lindley L.J.: Law of husband's domicile governs

‘It is not necessary to cite authorities to show that it is now settled that, according to international law as understood and administered in England, the effect of marriage upon the movable property of spouses depends (in the absence of any contract) on the domicile of the husband in the English sense.’³

This statement, clear though it appears on the surface, raises two problems that, owing to the scarcity of authority, are by no means easy to solve.

First, what is meant by ‘the law of the husband’s domicile’? Secondly, what is the effect if the law of the husband’s domicile is subsequently changed?

The prevalent view for many years was that the determining domicile is that which the husband possesses *at the time of the marriage*.⁴ On the whole it is an unobjectionable view, for in the vast majority of cases the parties retain the husband’s domicile immediately after the marriage. Nevertheless, a rule better calculated to function more justly and more conveniently in every case is one which selects the country of the intended matrimonial home. This is equivalent in the normal case to the domicile at the time of marriage, but its merit is that it meets the not unusual case where the parties intend to settle immediately after marriage in another country and in fact do so. The significant difference between these two views cannot be better illustrated than by the facts of the South African case, *Frankel v. Commissioners of Inland Revenue*.⁵ What is the ‘husband’s domicile’?

H, whose domicile of origin was German, and *W*, domiciled in Czechoslovakia, were married in Czechoslovakia in 1933. At the time of the marriage the parties had definitely agreed that they would leave

¹ For a valuable summary of the different systems found in the world see Wolff, pp. 355–8.

² *Saver v. Shute* (1792), 1 Anstr. 63; Foote, p. 348; Story, s. 186; Dicey, Rule 185; Westlake, s. 36.

³ *In re Martin, Loustalan v. Loustalan*, [1900] P. 211, 233. For an example of the application of this rule see *In re Bettinson’s Question*, [1956] Ch. 67.

⁴ Dicey, p. 795, Rule 171; Westlake, s. 36; Foote, p. 348; Beale, p. 1013; *Welch v. Tennent*, [1891] A.C. 639, at p. 644, *per* Lord Herschell.

⁵ [1950] 1 S.A.L.R. 220. For a full statement and discussion of the case see 3 I.L.Q.R. 439–42.

Europe for good and settle permanently in the Transvaal at Johannesburg. They established their home in that city four months after the marriage. After working there for four years, *H* was appointed by his firm director of their branch in Natal, whereupon he and *W* established their home in Durban with the intention of remaining there permanently. Eleven years later, *H* died. According to the law of South Africa, the parties had married in community of property, but according to German law the doctrine of community was inapplicable. If South African law applied, as *W* claimed, death duties were not payable. The Appellate Division of the Supreme Court of South Africa held unanimously that German law applied.

Domicil
intended
by the
parties
prevails

Now it may safely be asserted that it is no part of the court's function to defeat the reasonable intention of the parties, unless this is demanded by some fundamental doctrine or by some overriding requirement of public policy. It is clear that if this intention has been declared in an express contract it will prevail. Where the parties have thus purported to determine the rights that each shall have in the movable property of the other, the rule is that the contract continues to govern their rights, not only in the marriage domicil, but also in any other country where they may obtain a new domicil.¹ Where a contract governs the distribution of property, it must be recognized no matter where it is put in suit.²

'It is universally admitted', said Lord Brampton, 'that where, upon marriage, a marriage contract or settlement is made regulating the property of the spouses, such contract or settlement shall have effect given to its provisions wherever the spouses may afterwards be domiciled.'³

Thus in *Anstruther v. Adair*⁴ it was held that a domiciled Scotsman, who was entitled under a Scottish marriage settlement to any property that his wife might obtain during coverture, had an absolute claim to a sum of money falling due to the wife in England, even though by English law he would have been liable in equity to execute a settlement of the money.

Implicit
intention
sufficient
in prin-
ciple

There seems no reason why the intention of the parties should not similarly prevail where, though not expressed, it may be inferred by the court from the circumstances. In other words, the court should give effect to a tacit as well as to an

¹ *Anstruther v. Adair* (1834), 2 My. & K. 513; *Este v. Smyth* (1854), 18 Beav. 112; *In re Fitzgerald*, [1904] 1 Ch. 573; Story, s. 143; Dicey, Rule 170, p. 787; *Montgomery v. Zarifi* (1919), L.J.P.C. 20.

² *Duncan v. Cannan* (1854), 18 Beav. 128, 142.

³ *De Nicols v. Curlier*, [1900] A.C. 21, 46.

⁴ (1834), 2 My. & K. 513; and see *In re Fitzgerald*, [1904] 1 Ch. 573, 596.

express contract. An agreement by parties to establish the family home in a country other than the husband's present domicile may well connote an implicit agreement that their mutual proprietary rights should be adjusted according to the law of the new country. That the basis of the doctrine of the intended domicile is contractual was, indeed, one of the grounds upon which it was justified by Story. After referring to the American preference for the law of the place of performance in the case of commercial contracts, he said:

'Treated, therefore, as a matter of tacit matrimonial contract (if it can be so treated), there is the rule of analogy to govern it. And treated as a matter to be governed by the municipal law to which the parties were or meant to be subjected by their future domicile, the doctrine seems equally capable of a solid vindication.'¹

It may also be observed that in *De Nicols v. Curlier*² the House of Lords recognized the validity of an implicit contractual obligation as no less binding than that of an express contract.

The possibility of inferring such a contract has now been confirmed by Roxburgh J. in *In re Egerton's Will Trusts*.³ He there admits that an agreement to change the domicile, followed by an actual change, may render the law of the new domicile applicable, provided that a common intention to embrace this new law may be inferred. The importance of his judgment lies in the fact that, for the first time in England, the court has declared itself ready to oust the *lex domicilii* to which the husband was subject at the time of the marriage if an intention to adopt the law of another domicile can be spelt out of the facts of a particular case.

Implicit
intention
now held
to be
sufficient

'In my judgment', he said, 'it is reasonably plain that there is a presumption that the law of the husband's domicile applies to a marriage, and that the presumption can be rebutted. It can certainly be rebutted by express contract and, in my judgment, it could also be rebutted by what is loosely called a tacit contract, if the circumstances warrant the inference of such a tacit contract.'⁴

¹ Op. cit., para. 199.

² [1898] 1 Ch. 403; reversed, [1893] 2 Ch. 60; reversal reversed, [1900] A.C. 21. The facts of the case are given at p. 49, *supra*; and see also p. 572, *infra*. It should be noticed that the House of Lords used the implicit obligation in the case before them to apply the law of the ante-nuptial domicile of the parties.

³ [1956] 3 W.L.R. 453; [1956] 2 All E.R. 817.

⁴ Ibid., at p. 462. The learned judge referred to the doctrine of the intended matrimonial domicile as set out in the last edition of the present book and could find 'no foundation in the authorities' for the view as there expressed. He took the view to be that, contract or no contract, a mere intention to settle elsewhere,

But everything, he emphasized, must turn upon the precise facts of each case, including the reliability of the evidence by which the alleged agreement to change the domicile is supported and the length of time that may have elapsed before the fulfilment of that agreement. If there were such an agreement and if it were immediately put into effect, it would be comparatively easy to draw the inference that the parties intended the law of the new domicile to apply. But even in these favourable circumstances the inference would not necessarily be drawn.

'Take, for example,' he said, 'the case of two comparatively poor persons, one, the woman, having a few National Savings Certificates, and the man being a weekly wage earner. They both decide to emigrate to Australia. I can well believe that the court might think that that was enough in those circumstances to lead to the inference that they intended their proprietary rights (which at that stage were nugatory but which might thereafter become of great value) to be regulated from the beginning of their married life by the law of Australia. . . . However, take the case of an elderly widower who was a director of half a dozen companies in England and held shares and debentures and exchequer bonds and various things in England. He marries a young wife and, being ill and in need of a warm climate, agrees to leave immediately to take up his home in South Africa. I cannot imagine that any court would ever draw the inference from the mere fact that they had decided immediately to leave for South Africa to make it their permanent home, and did so, that he intended that all his proprietary rights should, as from the date of their marriage, be governed by the law of South Africa.'¹

In *Egerton's Case* itself the particular circumstances precluded a decision in favour of the law of the intended matrimonial domicile. The facts were these:

On May 6th, 1932, the testator domiciled in England married a woman domiciled in France. He acquired a French domicile at some time after September, 1934, and retained it until his death. The question to be decided was whether his estate should be administered on the footing that he and his wife were subject to the French régime of community of property at the time of the marriage.

In support of the contention that the law of France applied, since the parties had agreed before marriage to settle in that country, the wife swore the following affidavit, which was accepted by the court:

'Neither before nor at the time of my marriage to the testator, nor if in fact fulfilled, would displace the prior *lex domicilii*. No doubt the passage in question (p. 492) did not sufficiently stress the contractual character of the proposed doctrine.

¹ [1956] 3 W.L.R. 460-1.

at any time afterwards, was there any discussion or express agreement between us as to community or separation of property. It was, however, agreed between us before marriage that as soon as possible we would settle in France and establish our permanent and only home there. We carried this intention into effect, and neither of us ever had a permanent home outside France after the date of our marriage.'

Roxburgh J. held that the agreement to change the domicile did not render the proprietary rights of the parties subject to French law. The equivocal nature of the agreement which contemplated no immediate change of home, but only one that should be effected 'as soon as possible'; the long period that in fact elapsed before the new domicile was acquired; the lack of any evidence that the parties even appreciated the difference between the property régimes of the two countries, precluded the inference that in the minds of the parties the law of England was to be supplanted by that of France.

Stated in general terms, the present rule would seem to be this:

The presumption is that the rights of married persons in each other's movables are governed by the *lex domicilii* of the husband at the time of the marriage. This presumption may be rebutted by an express or implied agreement, made before marriage, that their rights shall be governed by the law of some other country in which they have already decided to establish their matrimonial home.

The decisive factor then in fixing the law to govern the rights of the parties in each other's movables is the domicile of the marriage, which, as we have seen, may be the domicile of the husband at the time of the marriage or that which the parties have expressly or implicitly agreed to acquire. But now a second question arises—What is the effect of a subsequent change of the marriage domicile? Are the mutual proprietary rights of the spouses affected by the change?

What is the effect of a change of domicile?

Most legal systems adopt what has been called the doctrine of immutability,¹ according to which the rights of property in movables as fixed by the law of the marriage domicile are unaffected by the acquisition of a fresh domicile. Thus the established rule in South Africa is that the law of the matrimonial domicile governs the rights of the spouses in movables, whether existing at the time of marriage or acquired later, and continues to govern them despite change of domicile. This is so even with respect to movables acquired in the new domicile.²

The doctrine of immutability

¹ Wolff, op. cit., pp. 360-1.

² *Gaarn v. Cairn's Executors*, [1910] E.D.L. 462.

The prevailing rule in the United States of America is not so comprehensive. The law of the marriage domicile continues to govern movables owned at the time of marriage, but movables acquired later are subject to the *lex domicilii* of the parties at the time of acquisition.¹

Controversy as to whether the doctrine prevails in England It is generally said that, according to English private international law, if the marriage domicile is abandoned the proprietary rights of the spouses are governed by the law of the new domicile. It is extremely doubtful, however, whether English law is committed to this doctrine of mutability. The one case invariably cited in its support is *Lashley v. Hog*,² but when analysed this appears to be quite irrelevant to the controversy. The facts were these:

Hog, a native of Scotland, married an Englishwoman at a time when he was domiciled in England. There was no marriage settlement. After living fifteen years in England the parties acquired a domicile in Scotland. Hog survived his wife and died in 1789. After his death, his daughter, Mrs. Lashley, brought an action in the Scottish court claiming as the representative of her mother a share in her father's movables which, according to the then law of Scotland, were subject to the doctrine of *communio bonorum*. The basis of her claim was that, upon the change of domicile from England to Scotland, her father's proprietary rights *vis-à-vis* his wife became restricted by the Scottish rule of community.

The House of Lords held that Scottish law governed Mrs. Lashley's claim, and that she was entitled in right of her mother to a share of the movables owned by her father at the time of her mother's death.³

What was the *ratio decidendi*? Was it that the rights of the wife with regard to the matrimonial property were enlarged as a result of the change of domicile? It would seem not. The view of the House of Lords was that the matter 'turned on testamentary and not on matrimonial law'.⁴ The so-called *communio bonorum* did not give the wife on marriage a proprietary interest similar to that recognized, for instance, by Dutch law, but only a *spes successionis*.⁵ The question, therefore, was not: Were the rights of the wife enlarged by the change of domicile? but, What were the succession rights of the wife or her representa-

¹ Goodrich, ss. 119, 120.

² (1804), 2 Coop. t. Cott. 449; 47 E.R. 1243, 4 Paton 581.

³ See now the Married Women's Property (Scotland) Act, 1920, s. 7.

⁴ Westlake, p. 74.

⁵ 53 L.Q.R. 539-40.

tive on the death of her husband? Thus Lord Halsbury, speaking of the decision in a later case, said:

'If the wife by the marriage in Scotland¹ acquired no proprietary rights whatever, but only what is called a hope of a certain distribution upon the husband's death, it is intelligible that that right of distribution, or by whatever name it is called, should be dependent upon the husband's domicile, as following the ordinary rule that the law of a person's domicile regulates the succession of his movable property. But if by the marriage the wife acquires as part of that contract relation a real proprietary right, it would be quite unintelligible that the husband's act² should dispose of what is not his; and herein, I think, is to be found the key to Lord Eldon's judgment.'³

The last sentence of this statement is a repudiation of the doctrine of mutability, for if the wife's acquired rights cannot be defeated by a change of domicile, neither can they be enlarged.

A more decisive authority than *Lashley v. Hog* must be found, then, before it can be categorically asserted that the proprietary relations between husband and wife change with a change of their domicile. It is a strong assertion to make, for, as Westlake says, 'justice is shocked by allowing the husband to affect the wife's position by a change for which he does not require her assent'.⁴ What is shocking is suspect, and it is in fact extremely doubtful whether English law has adopted the doctrine of mutability to its full extent. This doubt is engendered by *Chiwell v. Carlyon*,⁵ a case which appeared before both the English and the South African courts and which merits some consideration.

A decision
in favour
of im-
mutability

In 1887 *H* married *W* at Kimberley in South Africa. No antenuptial contract was made. The parties were domiciled at the time in South Africa, and while still so domiciled they made a joint will disposing of their joint estate, i.e. of the movables and immovables that they held in community. In 1892, after the parties had settled in England, certain land in Cornwall was bought by *H* and conveyed to him. *W* died in 1893, *H* in 1895.

The question that arose before the Chancery Division was whether the Cornish land passed under the will of the joint estate. This question would have been summarily dismissed

¹ The marriage in fact took place in London.

² i.e. the act of changing his domicile.

³ *De Nicols v. Curlier*, [1900] A.C. 21, at p. 27.

⁴ *Private International Law*, p. 73.

⁵ (1897), 14 S.C. 61 (South Africa).

with a negative answer had the true rule been that the proprietary rights of spouses change with a change of domicil, unless, of course, there was a clear intention on the face of the will that the joint property was to include the property later acquired, no matter where acquired. The community property disposed of by the will would not include either movables or immovables acquired by the husband after he had become domiciled in England. Stirling J., however, felt that the *lex domicilii* of the parties at the time of their marriage could not be disregarded, for he submitted two questions to the Supreme Court in the Cape of Good Hope. The second question was this:

Assuming *H* and *W* to have been domiciled in South Africa at the time of their marriage, but subsequently to have acquired an English domicil before the purchase of the land, would this change have any effect by South African law upon their respective rights in regard to the land?

The Supreme Court held that this question must be answered in the negative. The marriage created a universal partnership between husband and wife in all property, movable and immovable, belonging to either of them before marriage or coming to either during marriage. This partnership community extended to foreign land. It was unaffected by a change of domicil. If the rule were otherwise, a husband married in South Africa 'in community of property, who wishes to deprive his wife of her share, might change their domicil to a foreign country where community does not exist and there with impunity obtain the wife's share for himself by investing the whole of the partnership in immovable property situated in such foreign country'.¹

On receipt of this opinion from the South African court, Stirling J. decided that 'in any event the joint estate passing under the said will includes all property which according to the law of the Cape of Good Hope would fall within the community of property which would have been created by the marriage of the testator and testatrix, if they were domiciled at the Cape of Good Hope at the time of their marriage'.² He thereupon made an order declaring that the Cornish land passed under the will. Although dicta may be found to the

¹ *Per De Villiers C.J.*, at pp. 67-68.

² This case is not reported in England, but the Public Record Office reference to the Entry Books of Decrees and Orders [Supreme Court of Judicature] is 1897 A. 2919.

contrary, it would seem to be clear that the doctrine of community as recognized in South Africa does not rest upon the existence of a tacit contract between the parties. This decision of Stirling J., therefore, must be distinguished from that later given by the House of Lords in *De Nicols v. Curlier*,¹ where the facts, though in general similar, related to the French doctrine of community.

The law, then, is far from certain, but nevertheless an attempt must be made to state the modern rule. The clue to it seems to be the distinction between inchoate and vested rights. Even if the doctrine of mutability is part of English law it can scarcely operate without restriction, for not only justice but principle demands that a spouse shall not by reason of a change of domicil be divested of a right of property actually acquired under the law of the marriage domicil, even though enjoyment of the right may be postponed until the death of the other spouse.² Under the Dutch system of community of all goods, for instance, all movables belonging to husband and wife fall on marriage into the common ownership of both. Thus, on marriage, the wife becomes co-owner of movables then belonging to the husband. She also becomes co-owner of future movables when and as they are acquired.³ If parties domiciled in Holland at the time of marriage acquire a fresh domicil in England where the husband dies, the wife cannot on principle be deprived by her husband's will of what she owned when she reached England. No doubt the will of her husband, since he dies domiciled in England, is governed by English law, and English internal law does not recognize community of goods, but that cannot entitle him to dispose of what is not his. His power of testamentary disposition is limited by the extent of his title. If he dies intestate, his distributable assets are diminished by the rights of property therein owned by his wife. To recall Lord Halsbury's words: 'If by the marriage the wife acquires as part of the contract relation a real proprietary right, it would be quite unintelligible that the husband's act should dispose of what is not his.'⁴

But vested rights must be distinguished from those that are inchoate. When the Dutch couple change their domicil from Holland to England, it cannot be said that either of them has a vested right of property in movables not yet acquired.

¹ [1900] A.C. 21, *supra*, p. 49.

² Wharton (3rd ed.), ss. 193a, 197; Dicey, p. 796; Wolff, pp. 361-3.

³ Wolff, op. cit., pp. 356-7.

⁴ *Supra*, p. 507.

At the most they have a *spes acquisitionis*. It is a *spes* that is not recognized by the law to which they are now subject and which alone can make its voice effective. If, therefore, it should ultimately be decided that the proprietary rights of spouses change with a change in their domicile, this would presumably be subject to the exception that rights vested in either party under the law of some previous domicile remain unaffected.

Capacity
to make
marriage
settlement

It remains to consider what law governs the three questions of capacity, formal validity and essential validity in the case of marriage contracts or settlements.

*Capacity.*¹ The combination of circumstances which most neatly raises the question of capacity occurs where a woman, being an infant according to the law of her English domicile, makes a nuptial contract in England prior to her marriage with a foreigner, by the law of whose domicile the woman is not subject to any incapacity. A variation, which occurred in *Viditz v. O'Hagan*,² arises if the contract is made in a country which is the domicile neither of the woman nor of the man.

If in these cases we reason by analogy to mercantile contracts, the proper law of the contract governs, but if by analogy to the contract to marry, then the law of the matrimonial home is the governing system.

On prin-
ciple law
of matri-
monial
domicil
should
govern
capacity

It is submitted, however, that on principle the proper law of the settlement should govern, and that the proper law is *prima facie* deemed to be the law of the matrimonial home. It is that law which is universally recognized as controlling the personal and proprietary relations of the parties during their marriage, and it is difficult to appreciate why the one question of capacity to make a settlement should be withdrawn from that law and referred to the pre-existing *lex domicilii* of the woman. Though not uttered with reference to infants, the following words of Sir John Romilly appear to express the true and sensible principle:

'I know of no law whatever which would make a marriage settlement, executed and entered into in Paris, by persons who intended to come to this country and to be married here, invalid, by reason of its being a contract that was of no force in France, when the sole object and intention of the settlement was that it should be operative in England, over English property and regulate an English marriage.'³

¹ On this difficult subject see Dicey, pp. 790-2; 54 *L.Q.R.* 78; Morris, *op. cit.*, pp. 328-31.

² *Infra*, p. 513.

³ *Este v. Smyth* (1854), 18 Beav. 112, at p. 122.

Yet it is sometimes said that capacity in this connexion must be determined by the *lex domicilii* of each party. If the woman is subject to an incapacity by the law of her pre-nuptial domicile, though not by the law of her intended husband's domicile, the contract is void.¹ At the same time it is reasonably clear that the judgments which lay down this rule are based on hasty generalizations drawn from obscure dicta and partly from the writings of Continental jurists.

English decisions, however, favour *lex domicilii* of each party

The cases in chronological order are: *In re Cooke's Trusts*;² *Cooper v. Cooper*;³ and *Viditz v. O'Hagan*.⁴

The facts of *In re Cooke's Trusts* were that a domiciled English-woman, under twenty-one, married a Frenchman in France. Prior to the marriage, she made a notarial contract in France, which excluded the French doctrine of *communauté des biens* and gave her 'the entire administration of her property and the free enjoyment of her income'. There were three children of the marriage. After having lived in Jersey for eight years separately from her husband, she went through a ceremony of marriage with X in 1853 under the mistaken belief that her husband was dead. She resided with X and with her three children in New South Wales until her death in 1879. Her French husband did not die until 1877. She made a will leaving all her property to X. It was argued that the notarial contract was valid, and that it precluded the testatrix from depriving her children of the vested interests in her property given to them by French law.

In re Cooke's Trusts

Stirling J., after deciding that the woman died domiciled in New South Wales, held that her capacity to make the notarial contract was governed by English law, as being the law of her pre-marriage domicile. The consequence was that in his opinion her infancy rendered the contract 'void'. The reasoning which led the learned judge to this conclusion was not impressive. All that he did was to follow *Sottomayor v. De Barros* (No. 1),⁵ the *ratio decidendi* of which case was, in his opinion, to be found in two passages from the judgment. The passages that he deemed so authoritative were two *obiter dicta* of Cotton L.J. that are nowadays merely of academic interest; namely:

'It is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of the domicile';

¹ Wolff, pp. 366-7.

² (1887), 56 L.J. (N.S.), Ch. 637; 56 L.T. 737; 3 T.L.R. 558.

³ (1888), 13 App. Cas. 99.

⁴ [1899] 2 Ch. 569; reversed [1900] 2 Ch. 87.

⁵ (1877), 3 P.D. 1.

and,

‘As in other contracts, so in that of marriage, personal capacity must depend on the law of the domicile.’

The decision is of little value on the question of capacity, for the right of the Englishwoman to dispose of her property by will was in no way restricted by the French contract upon which the children relied. As Dr. Morris has said:

‘If a woman makes an ante-nuptial contract which merely excludes *communauté des biens* and gives her full powers of disposition, it is difficult to see how the children of the marriage can complain if they take nothing under the will.’¹

The decision, in other words, would have been the same had she been of full age when she made the contract.

Cooper v. Cooper The facts of *Cooper v. Cooper*,² a Scottish appeal to the House of Lords, were as follows:

A domiciled Irishwoman, 18 years of age, made an ante-nuptial contract at Dublin with her intended husband, a domiciled Scotsman, by which she purported to relinquish the proprietary rights that she would be entitled to under Scottish law upon the death of her husband. Both parties contemplated, in accordance with what proved to be the fact, that the matrimonial home would be established in Scotland. The husband died thirty-five years after his wife attained her majority. Upon his death she sued to set aside the contract on the ground that at the time of its execution she was a minor by Irish law.

It was held that the woman’s capacity must be governed by the law of Ireland, since that country was not only her domicile but also the place where the contract was made. Lord Halsbury appears to have chosen the *lex domicilii* as such, but Lord Watson and Lord Macnaghten refused to consider what law would have applied had the country of domicile and the place of contracting been different. Lord Macnaghten rejected the notion that Scottish law, as being the law of the matrimonial domicile, applied, saying:

‘It is difficult to suppose that Mrs. Cooper could confer capacity upon herself by contemplating a different country as the place where the contract was to be fulfilled, if that be the proper expression, or by contracting in view of an alteration of personal status which would bring with it a change of domicile.’

¹ 54 L.Q.R. 81; see also his *Cases on Private International Law*, 331.

² (1888), L.R. 13 App. Cas. 88.

In any event the decision is not readily explicable. By Irish law, as well as by English law, a marriage settlement is voidable, in the sense that it is treated as valid unless repudiated by the infant within a reasonable time after the attainment of majority.¹ Since there had been no repudiation within thirty-five years after that event, why was the settlement not valid even by the infant's pre-marriage *lex domicilii*? The true explanation seems to be that the House of Lords considered Scots law as well as Irish law to be a governing factor. By Irish law she might repudiate the contract or leave it in operation. By Scots law, the law of her new domicile, she could do nothing but repudiate it, since to ratify it or to leave it unrepudiated would constitute a gift that was revocable as being a donation *inter virum et uxorem*.² The decision, therefore, does not support the view that capacity to make a marriage settlement depends upon the *lex domicilii* at the time of the contract.

*Viditz v. O'Hagan*³ is a curious case, in which the facts were these: *Viditz v. O'Hagan*

A domiciled Englishwoman, under twenty-one years of age, made a marriage settlement at Berne in view of her approaching marriage with a domiciled Austrian. The settlement was voidable by English law; i.e. it could be rescinded by the settlor after attaining her majority, though it would become irrevocable if not rescinded within a reasonable time after that event. The rule of Austrian law, the law of the matrimonial domicile, was that the husband and wife might revoke the settlement at any time. Twenty-nine years after the settlement, i.e. long after it had become irrevocable by English law, the husband and wife executed an instrument in the Austrian form by which they exercised the right of revocation. They then brought the present action against the English trustees claiming a declaration that the settlement had been annulled. It was held by the Court of Appeal that they were entitled to the declaration, since the power of revoking the settlement was a matter for Austrian law.

In other words, by English law the wife could repudiate the contract, provided that she did so within a reasonable time after attaining her majority; by Austrian law, to which she later became subject, she could always repudiate it. Therefore the joint operation of the two laws rendered effective what the parties had done.

¹ *Edwards v. Carter*, [1893] A.C. 360.

² *Morris, Cases on Private International Law*, p. 330, citing Lord Lindley in *Viditz v. O'Hagan*, [1900] 2 Ch. 87, at pp. 96, 98.

³ [1900] 2 Ch. 87.

Neither *Cooper v. Cooper* nor *Viditz v. O'Hagan*, then, justifies the view that the *lex domicilii* of each party governs capacity, for if this were the law the contract in each case would have been valid as not having been repudiated within a reasonable time.

What law governs form of contract? *Formal validity.* What is the appropriate legal system which determines the forms and solemnities that must be observed in the case of a marriage settlement? If, for instance, an Englishwoman marries a man domiciled in one of those Continental countries where such a contract is void unless made by notarial act, and she wishes to make a settlement with ordinary English limitations, it is important to know whether the English or the foreign form must be followed. The proper course is to execute the settlement as an English deed and then to re-execute it as a notarial act, but if this is not done a difficult question arises. If the deed is executed in the foreign country it neglects the forms required by the *lex loci contractus*; if in England, it requires the parties to act under a transaction which is void of effect by the law of the matrimonial domicile.¹

Form of proper law sufficient Although the traditional view formerly was that a contract must observe the forms required by the *lex loci contractus*, it is now accepted that formalities, like essential validity, are governed by the proper law.² The form required by the *lex loci contractus* is sufficient but not essential. The English cases would clearly appear to show that in the case of marriage contracts relating to property it is sufficient to adopt the formalities of the proper law as an alternative to those of the *lex loci*.³

Van Grutten v. Digby The exact point arose in *Van Grutten v. Digby*.⁴

Prior to a marriage between an Englishwoman and a domiciled Frenchman, a deed of settlement in the English form and containing the usual English limitations was executed at Dunkerque. The settlement was wholly void by French law, since it had not been executed before a notary public. Five years later the husband filed a bill in Chancery claiming that, owing to the formal invalidity of the contract by French law, the settled property was subject to the doctrine of community of goods.

Lord Romilly held, however, that the contract was binding upon both parties.

'I hold it to be the law of this country', he said, 'that if a foreigner and an Englishwoman make an express contract previous to marriage,

¹ Westlake, pp. 77-78.

³ As to what is the proper law see *infra*, p. 515.

² *Supra*, pp. 228-9.

⁴ (1862), 31 Beav. 561.

and if on the faith of that contract the marriage afterwards takes place, and if the contract relates to the regulation of property within the jurisdiction and subject to the laws of this country, then, and in that case, this court will administer the law on the subject as if the whole matter were to be regulated by English law."¹

There are other decisions to the same effect.²

Essential validity. The essential validity of a settlement, Proper law governs essential validity whether voluntary or made in consideration of marriage, is governed by its proper law, i.e. the law of the country with which it is most closely connected and to which, therefore, it must be assumed that the parties intended to submit themselves.³ No two cases are alike, but the nature of the inquiry is constant. Are the localizing factors, as disclosed by the particular facts and circumstances, more densely grouped in one country rather than in another? In which country do they preponderate? These factors include such matters as the matrimonial domicile in the case of a marriage settlement and the domicile of the settlor and the beneficiaries in the case of one which is voluntary; the nature and situation of the settled property; whether the form and contents of the document are appropriate to one law, but not to another; the domicile of the trustees; the place where the accounts, the shares and other *indicia* of title are kept; the country where the trust is administered. In the case of a marriage settlement there is, indeed, a presumption in favour of the law of the matrimonial domicile, but this may well be rebutted by other circumstances.⁴

Since each case has its own peculiarities, it must suffice to contrast two decisions as illustrative of the manner in which *In re Fitzgerald* the courts solve the problem. In the first of these, *In re Fitzgerald, Surman v. Fitzgerald*,⁵ the facts were as follows:

Upon a marriage in Scotland between a domiciled Englishman and a domiciled Scotswoman, a marriage settlement was made in Scotland in Scottish form dealing with the wife's property. Most of the trustees were domiciled Englishmen. The settlement provided that the husband, if he survived his wife, should take an alimentary life interest in the property. An alimentary interest in Scottish law means one which can

¹ At p. 567.

² *Watts v. Shrimpton* (1855), 21 Beav. 97; *In re Barnard, Barnard v. White* (1887), 56 L.T. 9; *In re Bankes*, [1902] 2 Ch. 333.

³ *In re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573; *In re Bankes*, [1902] 2 Ch. 333; *Chamberlain v. Napier* (1880), 15 Ch.D. 614; *Iveagh v. Inland Revenue Commissioners*, [1954] Ch. 364 (voluntary settlement).

⁴ *In re Fitzgerald, supra*.

⁵ At p. 587.

neither be alienated by the life tenant nor seized in execution by his creditors. Such an interest is void by English law. The husband survived his wife, having mortgaged his life interest to English creditors. The question to be decided was whether the creditors were entitled to satisfaction out of the life interest.

The answer to this question depended upon whether the settlement was to be construed according to English law, which was the law of the matrimonial domicile, or according to the law of Scotland. It was held by a majority of the Court of Appeal that Scottish law must govern, since it was to that law that the parties intended to submit themselves. Cozens-Hardy L.J. said:

‘As a general rule the law of the matrimonial domicile is applicable to a contract in consideration of marriage. But this is not an absolute rule. It yields to an express intention that some other law shall apply. . . . It is not necessary that there should be an express stipulation. It is sufficient if the court arrives at the conclusion that the parties in fact contracted with reference to some law other than that of the matrimonial domicile.’¹

Vaughan Williams L.J. said:

‘It is the intention of the parties, gathered from the terms and circumstances of the contract, which determines the law which governs it, and in my judgment the Scotch form of this contract, coupled with the fact that Miss Lockhart, at the time of the marriage, was a domiciled Scotswoman, and that the property, the subject of settlement, came from her family, is sufficient to displace the prima facie presumption that the law of the matrimonial domicile is to govern the contract.’²

The proper law will not, of course, be applied if it conflicts with public policy or good morals as understood in England, but though this point was taken the Court of Appeal held that there was nothing immoral or opposed to public interest in the Scottish rule that an inalienable life interest may be given to a man.

Duke of Marlborough v. A.-G. A more recent and perhaps more controversial decision is that of the Court of Appeal in *Duke of Marlborough v. A.-G.*³

In 1895, upon the marriage in New York of the ninth Duke of Marlborough to Miss Vanderbilt, a minor at the time, the wife's father brought into the settlement two and a half million dollars, and covenanted to settle 100,000 dollars during the joint lives of himself

¹ At p. 588.

² At p. 594.

³ *Duke of Marlborough v. A.-G.*, [1945] Ch. 78. See a criticism of the decision by Morris, 61 *L.Q.R.* 223-4.

and the wife, and to pay a further two and a half million dollars on his death. One trustee was English, the other American. No English property was brought into the settlement. Throughout the marriage the funds remained invested in American securities, though there was power to buy English securities. The trust was always administered in America. The question before the court upon the death of the Duke in 1934 was whether succession duty was payable to the Crown in respect of the settled funds.

The court held, first, that in the case of a marriage settlement succession duty is exigible only if the proper law of the settlement is English; secondly, that the proper law in the instant case was English. In the opinion of the court, the English form of the settlement, the power to invest in English securities, and the establishment of the matrimonial domicile in England were in themselves sufficient to justify the second finding. But there were said to be further considerations which excluded 'all possible doubt'. These were, a covenant by the husband and wife to obtain the consent of the Chancery Division to the settlement under the Infants Settlements Act, 1855, and two subsidiary provisions in the settlement, which, though familiar to English law, were meaningless according to the law of New York.¹

III. ASSIGNMENT ON DEATH

The modern legal systems that have originated in English law differ fundamentally from those in which the doctrines of Roman law prevail with regard to the procedure by which property is administered after the death of its owner.² In England the only person entitled to deal with the property is he to whom a grant has been made by some public authority. This grant of the right of administration is made, according to the circumstances, to either an executor or an administrator. It is made to:

- an executor, when some person has been appointed as such by the will; or to
- an administrator *cum testamento annexo*, when a will has omitted to appoint an executor, or when the appointment fails, as, for instance, by the death or renunciation of the executor; or to
- an administrator, when the deceased has died intestate.

¹ These were (a) a reference to 'the statutory power of appointing a new trustee', and (b) a special indemnity given to the trustees 'in addition to the indemnity given by law to trustees'.

² Westlake, pp. 107-8.

The executors and administrators, or, to use a comprehensive expression, the personal representatives, become subject to two distinct duties. First, they must clear the estate of liabilities by the payment of funeral expenses and debts; secondly, they must distribute the residue of the estate among the beneficiaries according to the limitations of the will or the rules of intestacy. These two functions, debt-administration and beneficial distribution, are governed by different principles of private international law.

Continental doctrine On the Continent, however, in the rare case where personal representatives are appointed, their duties and functions are generally of a supervisory nature widely different from those of their English counterparts.¹ The general Continental rule is that the entire property of a deceased person passes directly to his heirs, testate or intestate, or to his universal legatee, subject, of course, to their acceptance. In accordance with the maxim *hereditas est successio in universum ius quod defunctus habuit*, these successors, broadly speaking, continue the existence of their predecessor.² For instance, unless they accept the inheritance with the benefit of an inventory, their liability for the debts of the deceased is not limited to the assets but is enforceable against their private property.

English grant essential for assets in England Thus the striking difference between English and Continental practice is that in the latter case the property passes on death directly to the successor, but that in England it cannot be dealt with by anyone without a public grant. It is important, however, to observe at once that the automatic transfer recognized by Continental systems of law can have no operation upon property of the deceased situated in England. Succession to movables is governed by the *lex domicilii* of the deceased, but, no matter what that domicile may be, nobody can rightfully and effectually obtain possession of movable property situated in England unless he gets an English grant of probate or of administration.³ Authority to administer English assets requires without exception an English grant.

¹ See, for example, *In re Achillopoulos*, [1928] 1 Ch. 433, 435.

² Distinguish the English personal representative, who, strictly speaking, does not represent the deceased at all. 'He claims what is termed the *glans caduca*, not the acorn on the tree, but the acorn which has fallen on to the ground from the tree'; per Kekewich J., *In re Barnett's Trusts*, [1902] 1 Ch. 847, 857.

³ *New York Breweries Co. v. A.-G.*, [1889] A.C. 62. It should be noted, however, that an executor derives his title from the will, not from the grant of probate.

(a) *Administration of assets*

The main problem that concerns us here is the position of an administrator, using that word to include English personal representatives and the Continental heir or universal legatee, as regards his title to property belonging to the deceased, and his right to sue or his liability to be sued in respect of obligations concerning the deceased. First, however, we must speak of the jurisdiction of the English court to grant administration.

The problem to be discussed

(i) *Jurisdiction of English court to grant probate or administration.*

One of the cardinal rules of private international law, as we shall see later, is that the movable property of a deceased person, so far as concerns either testate or intestate succession, is regulated by the law of that country in which he died domiciled. It might be thought, therefore, that the courts of that domicile have jurisdiction to make a grant of administration, merely on the ground of domicile and regardless of whether there are assets actually within the jurisdiction. Theoretically this principle is tenable, but there are two facts which militate against its application.

Jurisdiction depends, not on domicile, but on existence of local assets

First, such a grant would be ineffective if there were no assets within the jurisdiction.

Secondly, the jurisdiction of the old ecclesiastical courts, of which the modern Court of Probate is the successor, was universally founded upon the presence within the jurisdiction of movables belonging to the deceased.

The rule, in fact, for many years has been that an English court can grant administration only if there is property in England,¹ though it now has statutory authority to make a grant notwithstanding that the deceased left no estate.²

Except in the case of tangible movables there may be some difficulty in establishing the situation of property, especially in the case of *choses in action* such as debts and shares. For the purposes of jurisdiction to make a grant of probate or administration, however, it has long been settled with respect to *choses in action* and titles to property that judgment debts are assets where the judgment is recorded; leases, where the land lies; specialty debts, where the instrument happens to be; and

How situation of assets determined

¹ *Evans v. Burrell* (1859), 28 L.J.P. & M. 82; *In the Goods of Tucker* (1864), 34 L.J.P. & M. 180; Dicey, Rule 76.

² Administration of Justice Act, 1932, s. 2 (1); *In the Estate of Wayland*, [1951] 2 All E.R. 1041.

simple contract debts, where the debtor resides at the time of the testator's death.¹ Securities, such as bonds, promissory notes and bills of exchange which are transferable by delivery only, are assets if situated in England.² A share of stock, transferable only by registration, is situated, not in the place where the certificates happen to be, but in the country where the shares may effectively be dealt with as between the shareholder and the company, i.e. in the country where registration must be effected.³

To whom will the grant be made? Who are the persons in whose favour this jurisdiction ought to be exercised? A case that commonly arises is where a person dies domiciled abroad, leaving the bulk of his property in the foreign country and a smaller amount in England. The ideal here, just as in the case of bankruptcy, is to have one administration in the domicile for the whole of the property, but such principle of unity is not found in practice and is attainable only by international agreement. A separate grant of administration must be obtained from the English court with regard to the property in England. In such a case the person whose right to act is derived from the *lex domicilii* is known as the principal administrator, the person who is grantee under English law is called the ancillary administrator.

Person appointed in the domicile The usual course in England is to follow the law of the domicile and to make the English grant either to the person who has been selected in the domicile to perform the duties of administration, or to the person who is entitled by that law to administer the estate.⁴ In exceptional circumstances a grant may be made to the person who would have been entitled had the deceased died domiciled in England.⁵ Any instrument, though not a will strictly so called, will be admitted to probate if it is regarded by the *lex domicilii* of the deceased as a valid disposition of movables, as, for example, a friendly partition made by the members of the former reigning family in Romania.⁶ Lord Penzance stated the practice in these words:

'I have before acted on the general principle that where the court

¹ *A.-G. v. Bouwens* (1838), 3 M. & W. 171, 191, *per* Lord Abinger.

² *Winans v. A.-G.* (No. 2), [1910] A.C. 27.

³ *Brassard v. Smith*, [1925] A.C. 371; *Erie Beach Co. v. A.-G. for Ontario*, [1930] A.C. 161; *A.-G. v. Higgins* (1857), 2 H. & N. 339; *R. v. Williams*, [1942] A.C. 541; *supra*, p. 478.

⁴ *In the Goods of Smith* (1868), 16 W.R. 1130; *In the Goods of Hill* (1870), 2 P. & D. 89; *In the Goods of Earl* (1867), L.R. 1 P. & D. 450; *In the Estate of Yahuda*, [1956] 3 W.L.R. 20.

⁵ *In the Goods of Gustav Kaufman*, [1952] P. 325.

⁶ *In re Queen Marie of Romania*, [1950] W.N. 457; 94 S.J. 673.

of the country of the domicil of the deceased makes a grant to a party, who then comes to this court and satisfies it that, by the proper authority of his own country, he has been authorized to administer the estate of the deceased, I ought, without further consideration, to grant power to that person to administer the English assets.¹

The court, however, has jurisdiction to make a grant to some other person, such as a creditor, if the domiciliary representative or heir takes no steps to prove the will or to obtain letters of administration.²

But the domiciliary executor or heir has no absolute right to administer the English assets. The court has a discretion, and although there are few cases where it refuses to follow the foreign grant, it will certainly do so if the foreign grantee is incompetent according to English law to act as administrator. Thus no grant will be made to an infant.³

Foreign
executor
no right to
demand
English
grant

The procedure to be followed where the deceased has died abroad is set out in detail in a practice note issued by the Senior Registrar in 1953.⁴

(ii) *Duty of administrator acting under an English grant.*

Where an ancillary administrator has been authorized to deal with the English assets of a person dying domiciled abroad, the rule is that, though beneficial distribution is dependent upon the *lex domicilii*, the administration of the assets is governed exclusively by English law.⁵

Lex fori
governs
administra-
tion

'The principle is,' said Warrington L.J., 'that the administration of the estate of a deceased person is governed entirely by the *lex loci*, and it is only when the administration is over that the law of his domicil comes in.'⁶

¹ *In the Goods of Hill*, *supra*; *In the Estate of Humphries*, [1934] P. 78.

² *In the Estate of Leguia*, [1934] P. 80. See also the Consular Conventions Act, 1949, S. 1 (1) which allows a grant of administration to be made to the consular officer of a foreign State where the executor or other such person is a national of that State and is not resident in England and where no other application is made by a person duly authorized by power of attorney. A 'foreign State' means one with which a consular convention has been concluded and so declared by Order in Council.

³ *D'Orleans (Duchess)*, *In the Goods of* (1859), 1 Sw. & Tr. 253; presumably, *In the Goods of Da Cunha* (1828), 1 Hagg. Eccl. 237, would not now be followed.

⁴ Printed in [1953] 1 W.J.R. 1237.

⁵ Westlake, s. 110; Story, s. 524; *In re Kloebe* (1884), 28 Ch.D. 175; *In re Lorillard*, [1922] 2 Ch. 638; *Preston v. Melville* (1840), 8 Cl. & Fin. 1, 12-13; *Enohin v. Wylie* (1862), 10 H.L.C. 1, 13-14, *per* Lord Westbury.

⁶ *In re Lorillard*, *supra*, at pp. 645-6. By *lex loci* he meant *lex fori*.

Pearson J. illustrated the law more fully in an earlier case. He said:

'Therefore, if a man dies domiciled in England, possessing assets in France, the French assets must be collected in France and distributed according to the law of France. If the French creditors are entitled according to that law to be paid in priority, that rule must be observed, because it is the *lex fori* and for no other reason. But if it should happen that a man died domiciled in France, leaving assets in England, those assets can only be collected under an English grant of administration, and being so collected must be distributed according to the law of England.'¹

Foreign
creditors
entitled to
payment
according
to English
law

Thus the duty of an executor who receives a grant of administration from the English court is to pay all debts, whether domestic or foreign, according to the rules of English law. No distinction must be made between English and foreign creditors, no regard must be had to the corresponding rules of the *lex domicilii* of the deceased. A foreign creditor seeking payment here must take the law of England as he finds it. He can neither claim an advantage which his own or any other foreign law may allow him, nor can he be deprived of an advantage which belongs to him by English law though not by the *lex domicilii* of the deceased. In particular, the priority of debts² and their extinction by lapse of time³ are matters to be governed exclusively by English law. If, for instance, certain foreign debts owed by the deceased are statute-barred by English law but not so barred by the *lex domicilii*, the principal administrator in the country of the domicil is not entitled as of right to demand that the surplus English assets shall be handed over to him in order to satisfy the claims of the foreign creditors.⁴ The only difficulty is to determine at what stage administration ends and beneficial distribution begins.⁵ It has been held, for instance, that though all debts have been paid and a net residue ascertained, yet, if the beneficiaries are infants, the right of an administrator under the Administration of Estates Act⁶ to postpone the realization of the English assets is still exercisable, since postponement is a matter of administration.⁷ It has also

¹ *In re Kloebe* (1884), 28 Ch.D. 175, at p. 177. By 'distributed' the learned judge, of course, was referring not to the ultimate distribution among the beneficiaries, but to the distribution of the assets among the creditors.

² *In re Kloebe* (1884), 28 Ch.D. 175.

³ *In re Lorillard*, [1922] 2 Ch. 638.

⁵ *In re Kehr, Martin v. Foges*, [1952] Ch. 26.

⁴ *In re Lorillard*, *supra*.

⁶ S. 33.

⁷ *In re Wilks*, [1935] Ch. 645; *supra*, p. 51. Cf. *Re Northcote's Will Trusts*, [1949] 1 All E.R. 442; *Re Kehr*, [1951] 2 All E.R. 812; [1952] Ch. 26.

been held that a rule of the *lex domicilii* restricting the authority of an executor to a period of one year from the death of the testator must be disregarded in the English administration.¹

After all debts have been paid by an ancillary administrator according to the law of England, the usual procedure is for him to remit any surplus assets to the principal administrator, in order that they may be distributed among the beneficiaries according to the *lex domicilii*.² But this remission of assets is not a matter of course. It is within the discretion of the English court whether surplus assets shall be remitted to the domicil for purposes of beneficial distribution or whether that distribution shall be made from England. The sole function of the *lex domicilii* with regard to English assets is to regulate their beneficial distribution, not to allocate them in payment of debts. An immoderate use was made of this rational principle in the much debated case of *In re Lorillard*:³

Disposal
of surplus
assets

The testator, domiciled in New York, died leaving assets and creditors both in England and America. Administration proceedings were taken in both countries. The New York assets were exhausted, leaving unpaid certain creditors whose debts were statute-barred by English law but not so by the law of New York. There was a surplus of English assets after all creditors entitled under English law had been paid.

Eve J. made an order that if the American creditors did not within two months establish that their debts were payable by English law, the executor must not remit the assets in this country to the New York executor, but must distribute them among the beneficiaries. The Court of Appeal refused to interfere with the exercise by Eve J. of his discretion.

It certainly seems a strange exercise of judicial discretion to enrich beneficiaries at the expense of creditors entitled to payment in the place of the principal administration, for in the words of one commentator a testator should be assumed to be honest and 'to desire that all his legal debts as reckoned by the law of his domicil shall be disposed of before the estate is available for beneficiaries, and the English Court of Chancery

¹ *In the Estate of Goenaga*, [1949] P. 367. See 3 *I.L.Q.R.* 243 where it is shown that the decision, though correct in principle, is irreconcilable with *Laneville v. Anderson* (1860), 2 Sw. and Tr. 24.

² *In re Achillopoulos*, [1928] 1 Ch. 433.

³ [1922] 2 Ch. 638. The decision has been severely criticized by Berriedale Keith in the 5th edition of Dicey, pp. 984-7, and by Nadelmann in 49 *Michigan Law Review*, 1149.

should exercise its equitable jurisdiction to secure this just principle'.¹ In any event, this attack on the creditors will not always succeed. It succeeded in the instant case because the beneficiaries were resident in England, but had they resided in New York or, indeed, in any other country where statutes of limitation are not classified as procedural, they would have been liable at the suit of the creditors to disgorge what they had received.

On another view of the matter, however, the decision was probably unavoidable, for it is a rigorous rule of English private international law that a foreign statute of limitation must be totally ignored.² The pious hope may, therefore, be expressed that the decision will be restricted by the courts to the single case of foreign statute-barred debts, but this is by no means certain, for it has been judicially suggested that in every form of administration it indicates the principle upon which foreign liabilities should be accepted.³

(iii) *Title of administrator under an English grant.*

No title to foreign assets Although the theory may be that an English grant extends to property no matter where situated, it is obviously of no practical importance, for whether the administrator is entitled to the property of the deceased in a foreign country must necessarily depend upon the local law. The one certainty is that But an administrator acting under an English grant, who does accountably if he recovers them succeed in obtaining property in a foreign country, is accountable for it as administrator in England.⁴

Title to property reaching England after death The title of the administrator extends not only to property situated in England at the death of the deceased, but also to all property which comes to England thereafter.⁵ As Parke B. said in *Whyte v. Rose*:⁶

'Suppose after a man's death his watch be brought to England by a third party, could such party in answer to an action of trover by an English administrator plead that the watch was in Ireland at the time of his death?'

¹ Berriedale Keith, Dicey (5th ed.), p. 985. ² *Infra*, pp. 653 et seqq.

³ *Government of India v. Taylor*, [1955] A.C. 491, at p. 509, per Lord Simonds; same case *sub. nom. In re Delhi Electric Supply and Traction Co. Ltd.*, [1954] Ch. 131, at p. 161, per Evershed M.R., pp. 165-6, per Jenkins L.J. On this aspect of the case see 3 *I. & C.L.Q.R.* 504-6.

⁴ *Dowdale's Case* (1604), 6 Co. 47; *Stirling-Maxwell v. Cartwright* (1879), 11 Ch.D. 522; Westlake, s. 103.

⁵ Westlake, ss. 94-95; Dicey, Rule 60 (3).

⁶ (1842), 3 Q.B. 493, 506.

Property, however, which comes to England after the death of the deceased does not pass to the administrator under an English grant if it has previously been appropriated abroad by an administrator acting under the foreign *lex loci*.¹

(iv) *Position of foreign administrator acting in England without an English grant.*

The rule is absolute that the status of an administrator appointed by a foreign court is not recognized in England. His title relates only to property that lies within the jurisdiction of the country whence he derives his authority, and therefore he has no right to take or to recover by action property in England without a grant from the English court. If, without the support of an English grant, he succeeds in obtaining property in England, he is clearly liable as executor *de son tort* to account for the assets received.²

Foreign administrator liable if he intermeddles with assets

Since a foreign administrator has no right to sustain actions or to receive property in this country *qua* representative of the deceased, it would appear clear on principle that a debtor from whom he receives payment is not discharged from liability to an English administrator.³ As Story says,⁴ however, there is much room for discussion and doubt upon this matter. On the one hand, the domestic rule of English law is that 'where an executor *de son tort* is really acting as executor, and the party with whom he deals has fair reason for supposing that he has authority to act as such, his acts shall bind the rightful executor, and shall alter the property'.⁵ On the other hand, there is the undoubted fact that a foreign administrator, as such, has no authority to receive or otherwise deal with English assets.⁶ There is no English case directly in point, but if a debtor had reasonable grounds for believing that the foreign administrator was the bona fide representative of the deceased, it would seem justifiable to depart from strict principle and to regard the payment as a valid discharge. The majority of the State courts in America adopt this view.⁷

Does payment to foreign administrator discharge debtor?

¹ *Currie v. Birchem* (1822), 1 Dowl. & Ry. 35; Story, s. 516; Westlake, s. 95; Dicey, p. 338.

² Story, s. 514; Foote, p. 325; *New York Breweries Co. v. A.-G.*, [1899] A.C. 62. See *Beavan v. Lord Hastings* (1856), 2 K. & J. 724.

³ Westlake, s. 98; Dicey, p. 456.

⁴ S. 514.

⁵ *Randall v. Stevens* (1853), 2 E. & B. 630, 640; but see Foote, p. 325.

⁶ Story, s. 514.

⁷ Goodrich on *Conflict of Laws*, pp. 555-6; Wharton, 626a.

Foreign administrator may enforce right which belongs to him personally

But although a foreign administrator is not permitted to sue in England as the representative of the deceased, it has long been definitely established that he may enforce by action a right which is personal to himself and which he is entitled to assert in his own individual capacity, even though it is connected with the estate that he is administering.¹ If, for instance, the administrator in his official capacity recovers judgment abroad against a debtor, he has effectually reduced the debt into his possession,² and he can sue on the judgment in England without taking out a separate administration.³ In *Vanquelin v. Bouard*:⁴

A widow in France became donee of the universality of the succession of her deceased husband. By French law she was, as such donee, *personally* liable for her husband's debts and *personally* entitled to his property. She paid to an indorsee the amount of a bill of exchange which her husband had drawn, and later brought an action in England to recover this amount from the acceptor.

It was held that there were two grounds upon which the widow must succeed. First, the right that she sought to enforce was not one that formed part of the husband's estate at the time of his death but, since it arose from a payment made by her since the death, was a right which she had acquired personally. Secondly, her position as donee gave her, according to French law, a personal right to recover the sum from the acceptor.

Foreign administrator not liable to be sued in England

The liabilities to which an administrator is subject are imposed upon him in his capacity as the lawful representative of the deceased, and since the status of a representative appointed abroad is not recognized in England, it follows that a foreign administrator as such is not liable to be sued in this country.⁵ This is so even though he brings foreign assets to England. He cannot sue, neither can he be sued, in his capacity as administrator.

Administrator liable on personal transactions

But just as a foreign administrator can enforce in England a right which attaches to him personally, so he can be sued upon a claim which is sustainable against him, not in his representative, but in his personal, capacity.⁶ An action will not lie against

¹ *Vanquelin v. Bouard* (1863), 15 C.B. (N.S.) 341.

² Westlake, s. 97.

³ *In re Macnicol* (1874), L.R. 19 Eq. 81.

⁴ (1863), 15 C.B. (N.S.) 341.

⁵ *Beavan v. Lord Hastings* (1856), 2 K. & J. 724; Story, ss. 513, 514B; Westlake, s. 101; Dicey, Rule 107, p. 458.

⁶ Westlake, s. 100; Dicey, Rule 107 (2), p. 458.

an administrator if it is based upon a transaction entered into by the deceased, but it will lie upon a transaction effected by the administrator after taking office. Thus, for instance, he will be liable upon any contract connected with the winding-up of the estate that he makes in England.¹ Indeed, the liability in this country of a foreign executor would seem to go further than this, for if in any way he has changed his character from that of an executor to that of a trustee he would seem to incur liability within the principle of *Penn v. Baltimore*.²

It must finally be noted that a grant of administration made in Scotland³ or in Northern Ireland⁴ may be resealed in England, and thus made effective with regard to English assets.⁵ Again, a grant made in any part of the British possessions, exclusive of the United Kingdom but inclusive of protectorates and mandated territories, to which the Colonial Probates Act, 1892, has been extended by Order in Council, may likewise be sealed in England.⁶ An Order in Council, however, is not made until the colony in question has made adequate provision for the recognition within its territory of English grants. Orders in Council may also be made extending the provisions of the Act to any foreign country in which Her Majesty has jurisdiction.⁷ If the deceased died domiciled in England, probate or letters of administration may be resealed in the High Court in Northern Ireland⁸ or in the Sheriff Court at Edinburgh.⁹

Scottish,
Irish, and
Colonial
grants

¹ See the American case, *Johnson v. Wallis* (1889), 112 N.Y. 230; Beale, ii. 740.

² *Bond v. Graham* (1842), 1 Hare 482, 484; *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453; for *Penn v. Baltimore* (1750), 1 Ves. 444, fully discussed, see *infra*, pp. 582-91.

³ Supreme Court of Judicature Act, 1925, s. 168 (1) (2). See *In re Howden and Hyslop's Contract*, [1928] Ch. 479.

⁴ Supreme Court of Judicature Act, 1925, s. 169, as amended by Administration of Justice Act, 1928, s. 10.

⁵ The resealing does not relate back to the original grant. For the purpose of suing in England the executor is not an executor until the resealing is effected, *Burns v. Campbell*, [1952] 1 K.B. 15.

⁶ Colonial Probates Act, 1892; extended to protected States and mandated territories by Colonial Probates (Protected States and Mandated Territories) Act, 1927, s. 1. For a full list of the territories for which Orders have been made see Halsbury's *Laws of England*, vol. 16, p. 260, note (c). See also the annual supplement.

⁷ (1913), 3 & 4 Geo. V, c. 16.

⁸ Probate and Letters of Administration Act (Ireland), 1857, s. 94; Northern Ireland (Miscellaneous Provisions) Act, 1932, s. 2. English grants cannot be resealed in Eire, nor is the reverse process possible.

⁹ Confirmation of Executors (Scotland) Act, 1858, s. 14.

(b) *Beneficial distribution of movables*

Presuming that the estate has been cleared of debts, the next and final duty of the administrator is to distribute the property among those to whom it beneficially belongs. These persons vary according as the deceased dies testate or intestate.

(i) *Intestate succession.*

Lex domicilii governs succession

The rule has been established for some two hundred years that movable property in the case of intestacy is to be distributed according to the law of the domicile of the intestate at the time of his death.¹ This law determines the class of persons to take, the relative proportions to which the distributees are entitled, the right of representation, the rights of a surviving spouse, the liability of a distributee for unpaid debts, and all analogous questions.

Caducuary rights

The fate of movables situated in England and belonging to an intestate who has left no relatives recognized as his successors by the law of his domicile has already been fully discussed.² Summarily stated, the rule, which derives from the principle that the authority of the *lex domicilii* is rigorously confined to questions of succession, is this:

If, by the *lex domicilii*, the movables pass to the *fiscus* or some other body in the domicile by way of succession, English law gives effect to this ruling;³ if, on the other hand, they are seized by some body in the domicile as being *res nullius*, they pass to the English Crown as *bona vacantia*.⁴ In this latter case, there is no question of succession to be referred to the *lex domicilii*.

(ii) *Testamentary succession.*

Lex domicilii of testator governs

The general rule established both in this country and in the U.S.A. is that testamentary succession to movables is governed exclusively by the law of the domicile of the deceased as it existed at the time of his death.⁵ When a testator dies domiciled abroad leaving assets in England, it is true that probate must be taken out in England, and it is also true that the assets must be administered in this country according to English law, but

¹ *Pipon v. Pipon* (1744), Amb. 25; Westlake, ss. 59, 120; Story, s. 481; Dicey, p. 799.

² *Supra*, pp. 59 et seqq.

³ *In the Estate of Maldonado*, [1954] P. 223.

⁴ *In re Barnett's Trusts*, [1902] 1 Ch. 847; *In the Estate of Musurus*, [1936] 2 All E.R. 1666.

⁵ A subsequent change in the *lex domicilii* is of no effect: *Lynch v. Provisional Government of Paraguay* (1871), L.R. 2 P. & D. 268.

nevertheless all questions concerning the beneficial succession must be decided in accordance with the law of the domicil. The duty of the executor is to ascertain who, by the law of the domicil, are entitled under the will, and that being ascertained to distribute the property accordingly.¹ It is necessary, however, to deal separately with the various questions that arise in testamentary succession.

(a) *Capacity*. The capacity of a testator is determinable by the law of his domicil. The meaning of this statement is clear enough if he is domiciled in the same country at the time both of his making the will and of his death. If this is a foreign country, his capacity by English law is immaterial. Thus in a case decided when a *feme-covert* possessed no testamentary capacity at common law,² the English court granted probate of the will of a married woman, a domiciled Spaniard, upon proof that by Spanish law a wife was empowered to bequeath her movables.³

Capacity
of testator
governed
by *lex*
domicilii

Whether the law of the domicil in the present connexion means the law of the testator's domicil at the time of the making of the will or at the time of his death has never been decided. The majority of jurists, however, hold that it means the latter.⁴ This is curious, for by English internal law, and presumably by other municipal systems, the decisive moment for testing capacity is the time when the will is made. A will made by an infant or by a lunatic cannot be validated by subsequent events. No will can be valid unless it is valid when made. On principle it makes no difference that the subsequent event consists in a change of domicil to a new country where the law has a more favourable rule for capacity. For instance:

What is
the *lex*
domicilii?

A domiciled Hungarian, twenty-two years of age, and therefore lacking testamentary capacity by Hungarian law, makes a will, but ultimately dies domiciled in England.

It is submitted that the will is void. What is invalid for incapacity

¹ *Enohin v. Wylie* (1862) 10 H.L.C. 1, 19; Story, s. 466.

² Until the Married Women's Property Act, 1882, a married woman could dispose by will of her separate estate or of a power of appointment, and she could bequeath personalty with the assent of her husband, but otherwise she had no testamentary capacity.

³ *In the Goods of Maraver* (1828), 1 Hagg. Ecc. 498.

⁴ Westlake, s. 86; Foote, pp. 256-7; Beale, s. 306 (1); Goodrich, p. 512; Stumberg, p. 381. *Contra*, Dicey, pp. 818-19; Theobald on *Wills* (10th ed.), p. 3; Savigny, Guthrie's translation, p. 232; Story, s. 465; Johnson, iii. 66; Wolff, pp. 581-2.

in its origin can scarcely be automatically validated by the change of domicile. If, on the other hand,

a domiciled German, sixteen years of age, makes a will, as he is permitted to do by German law, but ultimately dies domiciled in England,¹

it is submitted that the will is valid. In fact it is difficult to disagree with the view that testamentary capacity, in the sphere of both internal law and private international law, is governed by the *lex domicilii* of the testator at the time when the will is made.²

Powers of
appoint-
ment and
capacity

Different considerations apply to the question of capacity to exercise a testamentary power of appointment given by an English instrument to an appointor domiciled abroad. The obvious principle here is that, just as in the case where a testator disposes of his own property, capacity must be tested by the law of the appointor's domicile. There is indeed no doubt that, if the rule of this law on the matter is satisfied, the appointment is good. It is enough, whether the power is general or special, that the appointor is of full capacity by his own *lex domicilii*, even though he is incapable by the law that governs the instrument by which the power was created.³ But this does not conclude the matter. As will be seen when the question of formal validity is considered,⁴ the view taken by English law is that the instrument which creates the power, not the one by which the power is exercised, is the governing instrument, and that the appointor is a mere agent to carry out the wishes of the donor. The appointee takes under the instrument of creation, not under the will of the appointor. If capacity stands on the same footing as formal validity, it follows, therefore, that an appointment is valid if the appointor has capacity by the law that governs the instrument of creation, though he may be incapable by the law of his own domicile. It may well be objected that even if the appointor is regarded as merely the agent of the donor he should not be free to do what, according to the law to which he is subject, he is incapable of doing.⁵ Nevertheless, the

¹ Martin Wolff, s. 557.

² Theobald on *Wills* (10th ed. by J. H. C. Morris), p. 3; Burge (1st ed.), iv. 580, stated the universal rule to be that in the event of a change of domicile the testator must have capacity both at the time of making the will and at death.

³ *In re Lewal's Settlement Trusts*, [1918] 2 Ch. 391, where a testamentary exercise by a domiciled Frenchwoman aged nineteen was upheld. But the English instrument of creation provided that the appointment should be made by will 'executed in such manner as to be valid according to the law of' the appointor's domicile.

⁴ *Infra*, p. 531.

⁵ Goodrich, p. 530.

view is not unreasonable in the case of a special power, for here the appointor's function is to select the beneficiaries from the class already designated by the donor. He is in no sense disposing of his own property. But there is little to justify a reference to the law governing the instrument of creation in the case of a general power, for the appointor in such a case can scarcely be regarded as a mere agent to implement the wishes of the donor.

The correct rule probably is, therefore, that the testamentary exercise of a general power is invalid for want of capacity, unless the appointor is capable by his *lex domicilii*; but that in the case of a special power the exercise is valid if he is capable either by his *lex domicilii* or by the law that governs the instrument of creation.¹

The capacity of a legatee to take a bequest is determined by the law of his domicil.² This law, not the *lex domicilii* of the testator, determines, for instance, whether he is of full age or whether an unincorporate association is capable of receiving a legacy. In the case of *In re Hellman's Will*,³ however, the court did not apply the law of the legatee's domicil exclusively, but adopted the principle that where there are two conflicting laws as to capacity, that is selected which is most favourable to the *propositus*.

A domiciled Englishman bequeathed legacies to each of the two children of a domiciled German. The children were a daughter aged 18 and a son aged 17. By German law girls attain majority on completing their eighteenth year; boys, on completing their twenty-second year.

It was held that the legacy to the daughter might be paid to her on her own receipt, since she was of age by her *lex domicilii*; and that the legacy might be paid to the son as soon as he attained majority according to English law or according to German law, whichever first happened.

(b) *Formalities*. Phillimore, writing in the early part of 1861,⁴ accurately, if somewhat chidingly, stated the rule with regard

¹ For a full discussion of the whole subject see Dicey, pp. 843-5.

² *In re Hellmann's Will* (1866), L.R. 2 Eq. 363; *In re Schnapper*, [1928] Ch. 420.

³ *Supra*. By German law the boy's father was entitled as guardian to receive the legacy. Lord Romilly M.R., however, refused to permit payment to him and ordered that during the minority the money should be treated as an infant's legacy; see Foote's criticism (pp. 74-75) of this aspect of the decision.

⁴ i.e. before Lord Kingsdown's Act, which was passed later in the same year; *infra*, pp. 533 et seqq.

Capacity of
legatee

At common law
the *lex domicilii*
governs
exclusively

to the system of law which governs the formal validity of a will.

‘As to the form of the testament. The jurisprudence of the Continent wisely, justly and philosophically allows an option to a testator to adopt either (a) the form required by the *lex loci actus*; or (b) the form required by the *lex domicilii*. The adoption of either form is, as jurists say, facultative, not imperative, though the general maxim be *locus regit actum*.

‘England and the North American United States unwisely, arbitrarily and unphilosophically compel the testator to adopt the form prescribed by the *lex domicilii*.’¹

The *lex domicilii*, in accordance with which the English law requires that a will should be made, is the law of the testator’s domicil *at the time of his death*. Until as late as 1830 it was probably true to say that the universal application of this principle was not recognized,² for in *Stanley v. Bernes*³ Sir John Nicholl held that a will of movable property made according to English law by a British subject who died domiciled in Madeira was valid. This decision was, however, reversed by the High Court of Delegates. The exclusive authority of the law of the testator’s last domicil was again affirmed by the Privy Council in the leading case of *Bremer v. Freeman*.⁴ In that case:

Fanny Calcraft, an Englishwoman domiciled at the time in France, made a will in Paris in the English form, executed according to the Wills Act, 1837, but not in accordance with the requirements of French law. She died domiciled in France. It was held that the will was invalid.

Lord Wensleydale, in delivering the judgment of the Court, said:

‘The post-mortuary distribution of the effects of a deceased person must be made according to the law of his domicil at the time of his death, if he dies without a will; and it seems equally to follow that if the law of the country allowed him to make a will, the will must be in the form and with the solemnities which that law required.’⁵

Difficulties
caused by
the rule

The hardship that may result from a rule so inflexible as this is obvious. A domiciled Englishman who wished to make a will while travelling abroad would be obliged to adopt the formalities prescribed by the Wills Act, 1837, but though it would be an easy matter with the help of a local lawyer to draft

¹ Phillimore, *Commentaries upon International Law*, iv. 627–8.

² See Lord Kingsdown’s speech on the second reading of the Wills Act, 1861, in the House of Lords; Hansard, vol. 162, pp. 860–80.

³ (1830), 3 Hagg. Ecc. 373.

⁴ (1857), 10 Moo. P.C. 306.

⁵ At p. 358.

a document according to the law of the place where he happened to be, it might be impossible to obtain advice from an expert versed in English law. Again, it would be useless for an Englishman, prior to going abroad in search of a new domicile, to make his will in the English form, since it might be invalid should he die domiciled in a place where different forms are required. It was with a view to relieving British subjects from such difficulties that the Wills Act, 1861, commonly called Lord Kingsdown's Act, was passed.¹ The main object of this is to provide that a will which is good as to form according to the law of the country where it is made shall never be rejected for want of form. The *lex loci actus* is to be an alternative to the *lex domicilii* at death.

Rule qualified by Lord Kingsdown's Act

The first section of the Act deals with wills made out of the United Kingdom and runs as follows:

Wills of British subjects made out of United Kingdom

'Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required by

- (i) the law of the place where the same was made; or
- (ii) the law of the place where such person was domiciled when the same was made; or
- (iii) the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin.'

If, therefore, a British subject, whose domicile of origin is in New South Wales, makes a will in Switzerland at a time when he is domiciled in France and ultimately dies domiciled in England, his will is formally valid by virtue of the section if it satisfies the requirements of any one of the following three laws,

- (i) Swiss law (*lex loci actus*), or
- (ii) French law (*lex domicilii* at time of execution), or the
- (iii) law of New South Wales (law of domicile of origin),

and it is valid at common law if it satisfies the requirements of

- (iv) English law (*lex domicilii* at death).

¹ For a trenchant criticism of the drafting of the Act see J. H. C. Morris in 62 *L.Q.R.* 173-6. For a Canadian redraft of the Act see 62 *L.Q.R.* 185, 328.

Restricted
application
of the Act

The restricted application of the section must, however, be observed. It is restricted to a will made out of the United Kingdom, a term which now includes no more than England, Scotland and Northern Ireland;¹ it deals only with the question of formal validity; it is confined to wills of British subjects; its operation is limited to personalty. As regards British nationality, it is indifferent whether the testator was a natural born or a naturalized subject,² but the status must have been possessed by him at the time when the will was made.³ It is presumably immaterial that he lost it later.⁴ 'Personalty' bears the ordinary meaning attributed to it by English internal law and thus includes, for example, leaseholds⁵ and land subject to a trust for sale but not yet sold.⁶

Wills made
within the
U.K.

The second section of the Act deals with wills made by British subjects within one of the countries forming part of the United Kingdom. The section provides that:

'Every will made within the United Kingdom by any British subject (whatever may be his domicile at the time of execution or of death) shall be formally valid as regards personal estate if executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.'

Thus if an Englishman, while on a visit to Edinburgh, makes a will there without witnesses, this holograph instrument, being recognized by Scottish law, must be admitted to probate in England.

This section has the same limited application as the first, but it is narrower in the sense that the only substitute it allows for the *lex domicilii* at the time of death is the *lex loci actus*. Under the first section, a will made in France according to English law by a British subject domiciled in England is valid, since it conforms to the law of the place where the testator was domiciled at the moment of execution. But a will made in England accord-

¹ Not Eire: Irish Free State (Consequential Adaptation of Enactments) Order, 1923; nor the Isle of Man, nor the Channel Islands; Royal and Parliamentary Titles Act, 1927, s. 2 (2).

² *In the Goods of Gally* (1876), 1 P.D. 438.

³ *Bloxam v. Favre* (1884), 9 P.D. 130; *In the Goods of Von Buseck* (1881), 6 P.D. 211.

⁴ So decided by the Supreme Court of British Columbia, *In re Colville*, [1932] 1 D.L.R. 47.

⁵ *Re Grassi, Stubberfield v. Grassi*, [1905] 1 Ch. 584. As to whether 'personal estate' includes a mortgage of freeholds see *In re Gauthier*, [1944] 3 D.L.R. (Canada), and article *ibid.* by Falconbridge.

⁶ *In re Lyne's Settlement Trusts*, [1919] 1 Ch. 80.

ing to Scottish law, by a British subject domiciled in Scotland, is not validated by the second section, though it is, of course, valid under the general rule if the testator dies domiciled in Scotland.

A testator, therefore, has certain choices open to him. He must, however, stand or fall by one of them. 'I am of opinion', said Lord Penzance, 'that, in determining the question whether any paper is testamentary, regard can be had to the law of one country only at a time.'¹ In the case from which these words are taken:

Only one law at a time open to testator

A testator, apparently domiciled in England, made a will in India, not properly executed according to the local law, and added a codicil at Florence. Neither was formally valid by the law of England or of Italy. He added a second codicil at Genoa. This was well executed according to Italian law, the *lex loci actus*.

The argument offered in support of the will being admitted to probate was to this effect: 'If you begin with Italian law you find a formally valid codicil. If you then turn to English law you find that the valid codicil, since it is endorsed on the will, operates as a republication of the will and thereby establishes it.' The court refused to combine the two laws in this way, and held that neither the will nor the codicil could be admitted to probate.

It is now necessary to consider what effect is produced if a testator changes his domicile, after having made a will that was formally valid according to the testamentary law that governed him at the time of execution. For instance:

Effect of a change of domicile

A French testator, while domiciled in France, makes an unattested will, valid according to French law, and later dies domiciled in England. Is the will void at common law as not having conformed to the *lex domicilii* at death? If so, is it saved by Lord Kingsdown's Act?

It is impossible to escape from the conclusion that at common law such a change of domicile is fatal to the validity of the will. To hold otherwise would be to stultify the general common law principle that a will must satisfy the formalities of the testator's last domicile. Moreover, such a decision would be contrary to principle. As pointed out in a leading American case,² the essence of a will is that it is ambulatory until death, a mere inchoate transaction having no legal significance and creating no

Effect of common law

¹ *Pechell v. Hilderley* (1869), L.R. 1 P. & D. 673.

² *Moultrie v. Hunt* (1861), 23 N.Y. 394; Lorenzen, *Cases on Conflict of Laws*, p. 780.

vested rights until consummated by death. If it were complete upon execution it could not, of course, be affected by a change of domicil, but since it does not become complete till death it is necessarily affected by that system of law which governs the testamentary dispositions of the deceased. Story does not hesitate to pronounce that a change of domicil, such as instanced above, invalidates a will.¹ There are several American decisions to this effect.²

In England, unfortunately, there is no decision in which the exact issue has been raised, but there is little doubt that a court would stand firm by the rule that the *lex domicilii* at death must be satisfied. This is implicit in the judgment of the Privy Council delivered by Lord Wensleydale in *Bremer v. Freeman*;³ though it was there pointed out that it was unnecessary to decide the question. It was there said:

'Their Lordships, however, do not wish to intimate any doubt that the law of the domicil at the time of the death is the governing law.'⁴

Effect of Lord Kingsdown's Act The question next arises whether a will which would thus be invalidated at common law by a change of domicil is saved by Lord Kingsdown's Act. That Act, in its third section, provides as follows:

No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicil of the person making the same.

Effect on wills of British subjects In the first place it is clear that, independently of this section, the formal validity of a will made by a *British subject* under the first or the second section is entirely unaffected by a subsequent change of domicil. Those sections provide that a will, which is formally valid according to one of the systems of law specified, shall be admitted to probate, 'whatever may be the domicil of such person . . . at his or her death'. When once a valid will has been made under either section, it is to remain valid.

Effect on wills of foreigners The first two sections, however, are expressly limited to British subjects, and the difficult question is whether the third section can have any operation upon the will of a foreigner. If a foreign testator while domiciled in France makes a holograph

¹ S. 743.

² *Moultrie v. Hunt*, *supra*; Goodrich on *Conflict of Laws*, p. 514.

³ (1857), 10 Moo. P.C. 306.

⁴ At p. 359.

will and later dies domiciled in England, does that section save the will from failure? The obvious comment to pass on this suggestion is that an Act entitled 'An Act to amend the laws with respect to wills of personal estate *made by British subjects*' cannot apply to foreigners, but as against this there are dicta to the effect that, though the title is part of a statute and may be examined in considering the scope of the enactment, it is not of much account on a question of construction.¹ The true view, however, probably is that, though the title cannot be used to control express provisions of an Act, yet, wherever there is any doubt about the meaning of a section, the Act should be construed consistently with the title.²

It thus becomes relevant to discover the object of the third section. The circumstances which gave rise to the Act are well known.³ They were connected with Fanny Calcraft's will, which was at issue in the case of *Bremer v. Freeman*.⁴ Fanny Calcraft, an Englishwoman resident in Paris, who had made a will conformably to English law, was held by the Privy Council to have died intestate because, being domiciled in France, she had not satisfied the formalities of French law. This decision was given in the face of an opinion stated on oath by ten advocates of the highest repute in France that, since Fanny had not obtained the necessary authorization from the French Government, she had never acquired a French domicile, and that consequently her will made in accordance with English law would be regarded as formally valid by a French court. However, it was held that she died intestate, and this caused so much alarm among British subjects resident in Paris that they pressed the legislature to provide a remedy for the future. Stimulated by this agitation Lord Kingsdown introduced his bill to alter the law, but, though not admissible as evidence,⁵ it is noteworthy that in his speech to the House of Lords on the second reading he spoke exclusively of Englishmen, Irishmen and Scotsmen, and never once hinted that he wished to legislate for the wills of foreigners.⁶

Genesis
of Lord
Kings-
down's
Act

¹ See, for example, *Kenrick v. Lawrence* (1890), 25 Q.B.D. 99, 104; see Wilberforce on *Statute Law*, pp. 274-6; Craies on *Statutes*, 3rd ed., pp. 173-7.

² See *Shaw v. Ruddin* (1859), 9 Ir. C.L.R. 214.

³ Sugden, *A Practical Treatise on the New Statutes relating to Property* (1862), pp. 398 et seqq.

⁴ (1857), 10 Moo. P.C. 306, *supra*, p. 532.

⁵ *Assam Railway and Trading Co. v. Inland Revenue Commissioners*, [1935] A.C. 445, 458.

⁶ Hansard, 162, 860 et seqq.

Probable
object of
s. 3 The very strong presumption, then, is that it was only for British subjects that the legislature intended to modify the exclusive authority of the *lex domicilii* at death. It could scarcely have intended 'to legislate for the wills of all testators in the world irrespective of their connexion with the United Kingdom'.¹ The probable object of the third section was to make it perfectly clear that a will valid under either of the first two sections should not be adversely affected by a later change of domicile. The section merely states more explicitly what had already been stated in the earlier sections. It is submitted that the true meaning is arrived at if the opening words of the third section are read as 'No *such* will'.²

Views of
Westlake Westlake,³ however, maintains that the section is of general application, and that a will validly made by a foreigner under the law of his domicile at the time of execution cannot be rendered formally void as a result of his death in a new domicile. This is a most desirable principle which might perhaps be supported by the maxim *ut res magis valeat quam pereat*, but it does not seem to be a justifiable inference from the Act. If it was really intended to alter for all people the English rule of private international law, that the *lex domicilii* at the time of death regulates formalities, it is scarcely credible that more explicit and direct language would not have been used. If clear language was employed in the first two sections to modify the rule for British subjects only, why should a far more sweeping alteration be introduced in such obscure phraseology?⁴

In re Groos The only decision which supports the contention of Westlake is *In the Estate of Groos*,⁵ where the facts were as follows:

The testatrix, who was not a British subject, made a will while domiciled in Holland and a week later married a domiciled Dutchman. By Dutch law the will was unaffected by the marriage, but according to English law it was thereby revoked. The parties acquired a domicile

¹ Dicey, p. 840.

² 62 *L.Q.R.* 175.

³ S. 85, pp. 121-2. Wolff, p. 588, agrees with Westlake as also does Graveson, op. cit. (3rd ed.), pp. 278 et seqq.; Breslau, 3 *I.L.Q.R.* 343 et seqq. and R. C. Little, 5 *I. & C.L.Q.R.* 118 et seqq.; Dicey, pp. 840-1, and Foote, p. 301, disagree. Schmitthoff, op. cit. (3rd ed.), p. 246, prefers the compromise suggested by Dicey in his lifetime, namely, that the section applies to the will of an alien, but only if he dies domiciled in England, Dicey, op. cit. (5th ed.), p. 820.

⁴ It is perhaps arguable, however, that since the third section does not apply to British subjects *expressis verbis*, as is the case with the first two sections, the intention must have been that it should have a different effect.

⁵ [1904] P. 269.

in England and after the death of the testatrix her husband moved for a grant of probate.

'Having considered the authorities', said Gorell Barnes J., 'I hold that S. 3 of the Act may reasonably be construed as applicable to a case such as this.' But in what manner did the learned judge classify the 'case'?¹ What was the problem according to his view of the facts? He appears to have directed his attention to the effect of the marriage upon the will, for according to one report he said:

'The point for my determination is whether the change of domicile renders the will bad on account of the marriage which took place after the execution of the will.'²

These words are slightly different in another report:

'The only point against the admission to probate of the will is that, although the testatrix was domiciled in Holland when she married after making her will, the domicile subsequently became English. Is the effect of this that the will becomes null and void in consequence of the subsequent marriage.'³

If this was the issue envisaged by the judge it was not a debatable issue, for whether a will is revoked by a subsequent marriage, as will be seen later, is a matrimonial question that falls to be determined once and for all by the *lex domicilii* of the parties at the time of the marriage.⁴ The rule of Dutch law that marriage does not operate as a revocation was therefore decisive, the validity of the will on that score could not possibly be affected by a later change of domicile and thus Lord Kingsdown's Act was totally irrelevant.

The irrelevance of the marriage being admitted, what the decision amounts to in effect is that by virtue of the third section of the Act a will formally valid according to the *lex domicilii* of the foreign testator at the time of its execution is admissible to probate, notwithstanding its formal nullity according to the English law of his domicile at the time of his death. But would not the reflection occur to the impartial observer that if the legislature intended to make such a profound, though desirable, change in the fundamental principle of the common law, it chose a curiously oblique way of effecting its purpose? In any event, the decision, if such was its intention and effect, is weakened by the fact that the will, since it was made in Holland

¹ As to this see 5 *I. & C.L.Q.R.* 118 et seqq.

³ (1904), 73 *L.J.P.* 82, 83.

² [1904] *P.* at p. 272.

⁴ *Infra*, p. 550.

before a notary and two witnesses, appears to have satisfied the formalities of English domestic law.¹ On general principles, therefore, it was rightly admitted to probate.²

Powers of appointment: We must now consider the question of formal validity in connexion with the testamentary exercise of powers of appointment. **What law governs formalities?** A power of appointment exercisable by will is frequently given by an English settlement or an English will to a person who ultimately dies domiciled in a foreign country. In such a case it is essential to ascertain the legal system which determines whether the formalities attending the testamentary exercise of the power are sufficient. The decision reached by English law on this matter may be stated as follows:

The execution by will of a power conferred by an English instrument is valid, if it satisfies the formalities (α) of the law governing the donee's will or (β) of internal English law.

(α) *That system of law by which the will of the donee of the power is tested.*

Any system recognized by English law as governing the will of appointor If an English instrument, whether a settlement or a will, gives to X a power of appointing property by will, all that is required to constitute a valid formal exercise is that the will in which the power is exercised shall be one which is recognized as valid by the English principles of private international law.³ It is not necessary that the will should satisfy the formalities of English internal law. The wills which are formally valid according to private international law are, as we have seen, those executed in accordance with the law of the testator's domicile at death,⁴ and those executed by British subjects according to one of the legal systems indicated by Lord Kingsdown's Act.⁵

'A power to appoint by will simply', said Lord Romilly, 'may be executed by any will which, according to the law of this country, is

¹ As appears from the report of a second case concerned with the same parties and facts, *Re Groos, Groos v. Groos*, [1915] 1 Ch. 572, 573.

² It must be admitted that this point was not taken by counsel.

³ *D'Huart v. Harkness* (1865), 34 Beav. 324; *In re Price, Tomlin v. Latter*, [1900] 1 Ch. 442; *In re Wilkinson's Settlement*, [1917] 1 Ch. 620.

⁴ For example, see cases cited in previous note.

⁵ *In re Simpson, Coutts & Co. v. Church Missionary Society*, [1916] 1 Ch. 502, 508-9. The inconsistent decision in *Hummel v. Hummel*, [1898] 1 Ch. 642, may be disregarded, as also the dictum of Kay J. in *In re Kirwan's Trusts* (1883), 25 Ch.D. 373, to the effect that Lord Kingsdown's Act does not apply to powers of appointment at all. In this case the appointment was void in any event, as not having satisfied the formalities prescribed by the donor; see *infra*, p. 541.

valid, though it does not follow the forms of the statute [i.e. the Wills Act, 1837].¹

If, for instance, the donee dies domiciled in France, a holograph will executed by him without the attesting signatures of witnesses is a valid exercise of the power.² If later he revokes the execution in a manner that is valid by French law, the revocation is effective.³ These rules apply both to general and to special powers of appointment.⁴

Where, however, some legal system other than internal English law is thus claimed to govern the exercise, the rule is that any special formalities which may have been imposed by the donor must be satisfied.⁵ This was decided in *Barretto v. Young*,⁶ where:

Requirements of the power must be satisfied

The power given to the donee was a power to appoint 'by her last will in writing . . . to be executed by her in the presence of, and attested by, two or more credible witnesses'. The donee, who died domiciled in France, left an unattested will which was valid according to French law.

It was held that the will, notwithstanding its conformity with the *lex domicilii*, was not a good execution of the power, since it disregarded the formalities specified by the donor. But an omission of this character may in a proper case be rectified by the court in accordance with the general doctrine that equity possesses jurisdiction to aid the defective execution of a power.⁷

(β) *English law as enacted by the Wills Act, 1837.*

When a testator possessing a power of appointment dies domiciled abroad, it is obviously contrary to principle that the formal validity of his testamentary exercise of the power should be determined by English internal law, since the fundamental doctrine is that his will must observe the formalities of the *lex domicilii*. The courts have held, however, that since the power has been given by an English instrument it is not unreasonable

Formalities of English law sufficient

¹ *D'Huart v. Harkness*, *supra*, at p. 328. ² See cases cited *supra*, p. 540, note 3.

³ *Velasco v. Coney*, [1934] P. 143.

⁴ *In re Wilkinson's Settlement*, [1917] 1 Ch. 620.

⁵ *Barretto v. Young*, [1900] 2 Ch. 339; *In re Kirwan's Trusts* (1883), 25 Ch.D. 373, as explained by Stirling J. in *In re Price, Tomlin v. Latter*, [1900] 1 Ch., at p. 452.

⁶ [1900] 2 Ch. 339.

⁷ *In re Walker*, [1908] 1 Ch. 560. The jurisdiction is exercisable in favour of a limited class of persons. In *Barretto v. Young* the appointees did not fall within that class.

to test the validity of its exercise by English law.¹ As Lord Romilly said in *D'Huart v. Harkness*:²

'The law takes a liberal view, and where the instrument creating the power directs it to be executed by will in a particular form, a will may be good for the purposes of the appointment if executed according to the law of this country, though not according to the law of the domicile.'

Additional
formalities
may be dis-
regarded

Where a will is so admitted as the valid exercise of a power on the ground that it complies with English law, it is immaterial that the donee has neglected to observe any special formalities imposed by the donor.³ Since the validity of the will is to be tested by English law, all that is necessary is that it should be signed by the testator in the presence of two attesting witnesses, for the Wills Act, 1837,⁴ expressly provides that a will so executed shall, so far as regards the execution and attestation thereof, be a valid execution of a power of appointment by will,

'notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.'

Governed
by law of
testator's
last domicile

(c) *Essential validity*. What Jarman⁵ calls the 'efficacy of testamentary dispositions' is determined by the law of the country in which the testator was domiciled at death.⁶ This rule is not affected by Lord Kingsdown's Act. A will may be admitted to probate under that statute as having complied with the formalities of one of the legal systems specified in the first two sections, but the actual effect of its dispositions must be measured by the *lex domicilii* at death. The grant of probate is conclusive proof that the instrument proved is the will of the testator but it is not conclusive as to the validity of the dispositions.

If, for instance, a British subject dies domiciled in France, having made a will in England according to English law, probate is necessarily granted. But if he has neglected to leave to his children that portion of the estate required by French law, the English court allows the will to

¹ *Tatnall v. Hankey* (1838), 2 Moo. P.C. 342; *In the Goods of Alexander* (1860), 29 L.J.P. & M. 93; *In the Goods of Hallyburton* (1866), L.R. 1 P. & D. 90; *In the Goods of Huber*, [1896] P. 209; *Murphy v. Deichler*, [1909] A.C. 446.

² (1865), 34 Beav. 324, 328.

³ *In re Price, Tomlin v. Latter*, [1900] 1 Ch. 442.

⁴ S. 10.

⁵ Jarman on *Wills* (7th ed.), p. 7.

⁶ *Thornton v. Curling* (1824), 8 Sim. 310; *Campbell v. Beaufoy* (1859), John. 320; *Macdonald v. Macdonald* (1872), L.R. 14 Eq. 60; *re Groos, Groos v. Groos*, [1915] 1 Ch. 572.

take effect only as it would do in France. If French law regards the testamentary dispositions as ineffective, the court directs the property to be distributed according to the French law of intestacy.¹

The principle that the law of domicil at death is decisive is well illustrated by the reverse case to that just given. An example is afforded by *Re Groos*, *Groos v. Groos*² where the facts were as follows:

A Dutch lady made her will in Holland constituting her husband heir of her movable property except for the 'legitimate portion to which her descendants were entitled'. She died domiciled in England, leaving her husband and five children surviving. By Dutch law the 'legitimate portion' of the children was three-fourths of the estate, but by English law it was nothing. It was held that, since the will operated under English law, the whole estate passed to the husband.

Whether a beneficiary is entitled to take under a will is determined by the *lex domicilii* of the testator if the question turns upon a rule of substantive law, not upon procedure. In the case of *In re Cohn*:³

Examples
of essential
validity

A testatrix and her daughter, both domiciled in Germany, were killed in an air raid in London in circumstances which left it uncertain which of them died first. The daughter's estate was entitled under her mother's will, but only if she were the survivor. In such a case the English rule is that the younger person is presumed to have survived the elder,⁴ but the presumption by German law is that they died simultaneously.

These presumptions were classified as falling within the sphere of substantive law, and it was held that the German view must be adopted.

Other examples falling under the same principle are whether a gift to an attesting witness, or to the relative of an attesting witness, is valid;⁵ whether a legacy lapses;⁶ what passes under a residuary gift,⁷ and whether a beneficiary is put to his election.⁸

¹ Cp. *Thornton v. Curling*, *supra*; *Campbell v. Beaufoy*, *supra*.

² [1915] 1 Ch. 572. ³ [1945] Ch. 5; 61 L.Q.R. 340.

⁴ Law of Property Act, 1925, s. 184.

⁵ *In re Priest*, [1944] Ch. 58. This case has been much discussed; see 60 L.Q.R. 114; 61 L.Q.R. 124; 62 L.Q.R. 172-3; 7 M.L.R. 238; Wolff, p. 586.

⁶ *In re Cunningham*, *Healing v. Webb*, [1924] 1 Ch. 68.

⁷ Goodrich, p. 516.

⁸ See *In re Ogilvie*, [1918] 1 Ch. 492, 500; Dicey, pp. 833-5; Westlake, s. 125; Halsbury, *Laws of England*, vii. 64; Jarman on *Wills* (7th ed.), p. 511. These authorities do not seem to have been cited to Cohen J. in *In re Allen's Estate*, [1945] 2 All E.R. 264; see *infra*, p. 578, note 1.

Not all
domestic
rules of law
domicilii
necessarily
applicable

It should not be assumed that because a testator dies domiciled in England his will is therefore inevitably subject to all the rules of English domestic law concerned with essential validity. This fact has not always been admitted. It has been said, for instance, that whether a restraint upon marriage,¹ or a gift for masses,¹ or a gift to a charity is valid, or whether a limitation is void as infringing the rule against perpetuities,² must be determined by the *lex domicilii* of the testator no matter what the domicil of the beneficiary may be. It is submitted that this view is neither consonant with principle nor warranted by the authorities. It entirely ignores the essential fact that, in the case of a legacy which is to be enjoyed and administered wholly in a foreign country, the question whether it is affected by a given rule of English domestic law cannot be answered until the rule has been considered in the light of the purpose which it is designed to effect and of the policy that lies at its root.

Suppose that a testator domiciled in England bequeaths a sum of money to a legatee domiciled in France, and that the legacy, though valid by French law, is void by English internal law as being in restraint of marriage or obnoxious to the perpetuity rule.

Is the legacy void? The answer must be in the affirmative if the English policy is to liberate beneficiaries from certain marriage restraints no matter in what part of the world they may live, or to insist upon the early vesting of interests regardless of where the property is to be enjoyed and administered. Such a suggestion is untenable. The prohibition of restraints upon marriage is an expression of stringent domestic policy, obviously limited in its sphere of operation. The object of the perpetuity rule is to restrict the withdrawal of property from the channels of commerce, a purpose which is clearly local. Again:

Suppose that a testator, domiciled in England, leaves a sum of money in trust that the income thereof shall be used for purposes most conducive to the good of religion in a certain diocese in country *X*, and that persons domiciled in *X* are appointed to administer the trust.

The trust is invalid by English law as not being charitable,³ but, if it is valid by the law of *X*, must the court forbid payment of the money to the trustees? Such a ruling would be indefen-

¹ Westlake, p. 154.

² Ibid.; Dicey, pp. 827-8.

³ *Dunne v. Byrne*, [1912] A.C. 407.

sible. English law confines the definition of a charity within comparatively narrow limits, presumably with the object of restricting the amount of money that may be withdrawn from circulation, but it cannot justifiably claim to impose this policy upon foreign countries. The decisive factor is the law of the country where the trust is to be administered, not the law that governs the instrument of gift. The only legitimate concern of the English court in the case of a legacy to a domiciled foreigner is that any directions imposed upon him do not infringe the law to which he is personally subject.

This indeed is the view that has been adopted by the English courts in the case of foreign charities,¹ though not in the case of gifts for masses.² *Fordyce v. Bridges*,³ for instance, is a valuable authority, since it illustrates the attitude of the courts, not only towards gifts to foreign charities, but also towards the intent and scope of the rule against perpetuities.

An English testator gave the residue of his personal estate to trustees upon trust that they should convert the same into money and lay it out in the purchase of land in England or Scotland according to the limitations of a Scottish entail. Such limitations infringe the English rule against perpetuities. A bill was filed to test the propriety of purchases in Scotland.

It was held that the legacy to be expended in Scotland in a manner permissible by Scottish law was valid. Lord Cottenham said:

‘An objection was made that the bequest of a fund to be invested in a regular Scotch entail was void as a perpetuity. The rules, acted upon by the courts in this country with respect to testamentary dispositions tending to perpetuities, relate to this country only: . . . The fund being to be administered in a foreign country is payable here, though the purpose to which it is to be applied would have been illegal if the administration of the fund had to take place in this country. This is exemplified by the well-established rule in the case of bequests within the statute of Mortmain. A charity legacy void in this country under the statute of Mortmain is good and payable here if for a charity in Scotland.’⁴

¹ *Fordyce v. Bridges* (1848), 2 Ph. 497; see Theobald, *The Law of Wills* (11th ed.), p. 10; *Oliphant v. Hendrie* (1784), 1 Bro. C.C. 571; *Mackintosh v. Townsend* (1809), 16 Ves. 330. To be valid the gift must be of movables. A bequest of money to arise from the sale of English land for a charity in Scotland is void, *Curtis v. Hutton* (1808), 14 Ves. 537; dist. *A.-G. v. Mill* (1831), 2 Dow. & Cl. 393. For the trend of the U.S.A. decisions see Wharton (3rd ed.), pp. 1318 et seq.; Goodrich, p. 702.

² *In re Elliott* (1891), 39 W.R. 297; *In re Egan* (1918), *L. J. Newspaper*, 314.

³ (1848), 2 Ph. 497.

⁴ At p. 515.

It would seem, then, that the principle which refers questions of substantial validity to the *lex domicilii* of the testator is not unqualified.

Essential
validity of
appointed
interests
Special
powers

The proper law to govern the essential validity of a disposition resulting from the exercise of a power of appointment depends upon whether the power is general or special. The effect of the appointment in the case of a special power is determined by the legal system to which the instrument that created the power is subject, for, since the appointor is merely the agent through whom the donor of the power designates the beneficiaries, the latter take under the instrument of creation.

'But the power in this case is a special power, and the execution of such a power does not bring the appointed property into the will of the appointor at all, but operates as a nomination of the persons whose names are to be inserted in the settlement as entitled in remainder in lieu of the power of appointment. There is therefore no disposition of property belonging to the testatrix.'¹

In the case in which these words were spoken :

A domiciled Frenchwoman, who had a special power of appointment given by an English settlement, was held capable of exercising it in a manner which was contrary to the law of France.

General
powers

The donee of a general power, on the other hand, is entitled to dispose of the property as if it were his own, and it is therefore established that the operation and effect of the appointment is determined by the law that governs the will in which he makes the appointment, i.e. by the law of his last domicil.²

The pro-
vince of
construc-
tion

(d) *Construction*. The province of construction is to ascertain the expressed intentions of the testator, i.e. the meaning which the words of the will, when properly interpreted, convey.³ If the intention is expressed in a manner which leaves no room for possible conjecture, the aid of private international law is unnecessary, for the duty of any court, no matter in what country it may sit, is to give effect to expressed intentions, and, these being clear, there can be no occasion to test the language of the will by reference to any particular legal system. If, however, the language of the will leaves the intention doubtful, or if it uses expressions which are ambiguous or equivocal, a problem of choice of law arises, for it is essential that the doubtful intention of the testator should be ascertained by reference to rules of

¹ *Pouey v. Horder*, [1900] 1 Ch. 492, 494, *per* Farwell J.

² *In re Pryce, Lawford v. Pryce*, [1911] 2 Ch. 286.

³ Hawkins on *Wills*, p. 1.

construction obtaining in one particular system of law. The consequences may be serious according as this law or that law is chosen, for when it is said that the intention of the testator is the sovereign guide in questions of construction, this does not mean that his language is necessarily to be construed in a manner which would commend itself to an intelligent man, but that it must be read in the light of those technical rules of construction recognized by the governing legal system. The following description which Jarman gives of the view of English law on the matter is apposite:

‘Though the intention of testators, when ascertained, is implicitly obeyed, however informal the language in which it may have been conveyed; yet the courts, in construing that language, resort to certain established rules, by which particular words and expressions, standing unexplained, have obtained a definite meaning; which meaning, it must be confessed, does not always quadrate with their popular acceptance. This results from the intendment of law, which presumes every person to be acquainted with its rules of interpretation, and consequently to use expressions in their legal sense, i.e. in the sense which has been affixed by adjudication to the same expressions occurring under analogous circumstances.’¹

It will be seen, therefore, that in choosing a law to govern construction the desideratum is to discover that system with which the testator was most intimately acquainted, and which it is just to presume that he had in mind when drafting his testamentary dispositions. Certain expressions, such as ‘next of kin’, bear different meanings in different countries, and it is obvious that the intention of a testator may be defeated unless the legal system with reference to which he wrote his will is correctly ascertained.

Legal system intended by testator should govern construction

The law with which the ordinary person is most familiar is the law of his existing domicile, and, despite the fact that certain authorities choose the last domicile as the controlling factor,² it is more consonant with the desire of the court to implement the intention of the testator to say that the law of the domicile at the time when his will is made governs its construction, unless there is evidence indicating that his mind was directed to some other legal system.

Prima facie law of testator's existing domicile governs construction

In most cases, of course, the domicile does not change after the will has been made and the Reports freely illustrate the

Examples

¹ Jarman on *Wills* (1st ed.), ii. 737.

² *In re Cunningham*, [1924] 1 Ch. 68; *Trotter v. Trotter* (1828), 4 Bli. (N.S.) 502; *Yates v. Thompson* (1835), 3 Cl. & Fin. 544.

Meaning of 'next of kin' application of the *lex domicilii* at death. Where, for instance, a domiciled Englishman bequeathed a legacy to the 'next of kin' of a foreigner, it was held that the legatees must be ascertained according to English law.¹ Whether a gift in the will of a domiciled Englishman was a satisfaction of a debt due under a Scottish settlement was tested by reference to English law.² Words of value or of quantity or of measurement, which vary in meaning in different countries, are interpreted according to the *lex domicilii* of the testator.³ If, for example, a testator domiciled in Queensland bequeaths £1,000 to a domiciled Englishman, the legatee will receive as many English pounds as are obtainable for £A1,000.

Above rule yields to contrary intention There is, however, no absolute rule that the interpretation of a will depends upon the law of the testator's domicil. It is merely a *prima facie* rule which is displaced if the testator has manifestly contemplated and intended that his will should be construed according to some other system of law.⁴ Thus where a domiciled Frenchwoman left an unattested will valid by the law of France, in which she said that the will was to 'be considered in England the same as in France', Stirling J. held, upon the question whether the document operated as the execution of a power, that the testatrix wrote with reference to English law.⁴

Effect of Lord Kingsdown's Act on construction Westlake has suggested that since Lord Kingsdown's Act a will must always be construed according to the law of the testator's domicil at the time of making the will, not according to the law of his last domicil.⁵ Lord Lyndhurst, however, in his speech on the third reading of the bill, said:

'It relates merely to the form of the instrument, and the manner in which it ought to be executed. It has nothing whatever to do with the construction of a will after it has been submitted to probate.'⁶

Notwithstanding these words, it is possible within limits to subscribe to Westlake's view. In fact it would seem that the learned author, while going too far in applying his suggestion to all testators, whether British subjects or not, is unduly cautious in limiting it to the law of the domicil. It is submitted

¹ *In re Fergusson's Will*, [1902] 1 Ch. 483. But see *In re Goodman's Trusts* (1881), 17 Ch.D. 266; *supra*, p. 404.

² *Campbell v. Campbell* (1866), L.R. 1 Eq. 383.

³ *Pierson v. Garnet* (1786), 2 Bro. Ch. 38; Story, s. 479 (b); Westlake, s. 123.

⁴ *In re Price, Tomlin v. Latter*, [1900] 1 Ch. 442.

⁵ Westlake, p. 155.

⁶ Hansard, vol. 162, p. 1641.

that, in view of the desire of English courts to discover a testator's real intention, the following proposition is justified:

If the will of a British subject is admitted to probate because it has been executed according to one of the legal systems prescribed by Lord Kingsdown's Act, the presumption, in the absence of evidence to the contrary, is that the testator intended it to be construed according to the legal system from which it derived its formal validity.

This principle, that a contrary intention will exclude the *lex domicilii*, is of importance in connexion with s. 27 of the Wills Act, 1837. The rule of domestic English law prior to that Act was that, if a testator made a bequest in general terms, as, for example, where he said, 'I give and bequeath all my personal estate to AB', the bequest did not operate as an execution of a power of appointment unless an intention to exercise the power could be gathered.¹ The Act, however, has introduced a distinction between general powers and special powers, by providing that a general gift, whether of realty or of personalty, shall be construed as including property over which the testator has a *general* power of appointment, unless a contrary intention appears by the will.²

Effect of
general be-
quests upon
powers of
appoint-
ment

The problem that this raises in private international law is whether the section can be applied to a will other than one made by a testator domiciled in England.

Suppose, for instance, that a testator, domiciled in France and having a general power of appointment by virtue of an English settlement, makes a valid will according to French law. The will does not refer in any way to the power but merely disposes of the property in general words. A power to dispose of property not belonging to the donor (which is the true nature of a power of appointment) is unknown to French law. The will, therefore, if construed according to French law, can scarcely be said to constitute an execution of the power. Can a section in an English statute be invoked to show that the testator intended to exercise the power?

After considerable judicial conflict this question has been answered in the affirmative.³ The French court, being ignorant of the peculiar power of disposition thus given by an English instrument, would have to turn to English law (with reference

¹ *Lake v. Currie* (1852), 2 De G. M. & G. 547

² See Hawkins on *Wills*, pp. 30-33.

³ *In re Simpson*, [1916] 1 Ch. 502; *In re Lewal's Settlement Trusts*, [1918] 2 Ch. 391; *In re Wilkinson's Settlement*, [1917] 1 Ch. 620. Decisions to the contrary are: *In re D'Este's Settlement Trusts*, [1903] 1 Ch. 898; *In re Scholefield*, [1905] 2 Ch. 408.

to which the testator obviously wrote) in order to ascertain the nature of the right and the manner in which it might be exercised.

Revocation (e) *Revocation*. It is convenient to deal with this matter under two heads according as the alleged cause of revocation is the subsequent marriage of the testator or some other act done by him.

Revocation by marriage *Revocation by subsequent marriage*. The rule, for instance, of English law is that a will is revoked by marriage unless it is explicitly expressed to be made in contemplation of marriage.¹ Few other legal systems have adopted the rule. When, therefore, a person marries after making a will and then dies after acquiring a new domicile, the question may arise whether the *lex domicilii* at the time of marriage or the *lex domicilii* at the time of death determines the effect of marriage on the will.

This rule of revocation part of matrimonial law The answer to this question depends upon whether the rule as to revocation by marriage is to be classified as a rule of matrimonial law or of testamentary law. If it is a rule concerning husband and wife, then its effect must be tested by the law of the matrimonial domicile, i.e. in most cases by the *lex domicilii* of the husband at the time of marriage; if, on the other hand, it has nothing to do with the matrimonial régime at all,² its effect is measured by the *lex domicilii* at the time of the testator's death. It would seem scarcely open to doubt that it is essentially a doctrine connected with the relationship of marriage, and that this is so was affirmed by Vaughan Williams L.J. in the case of *In re Martin, Loustalan v. Loustalan*.³

Therefore tested by law of matrimonial domicile If we disregard Lord Kingsdown's Act for the moment, a concrete example will show the effect of a change of domicile.

A makes a will while domiciled in England; then acquires a domicile in Scotland (where marriage does not revoke a will); then marries in Scotland, and ultimately dies domiciled in England.

In this case the will stands. English law applies only as being the governing testamentary law under which *A* dies, and therefore its doctrine as to the effect of marriage cannot affect a marriage that took place when the parties had a foreign domicile. The reverse case to that just put is as follows:

A makes a will while domiciled in Scotland; then acquires an English domicile and later marries in England.

¹ Wills Act, 1837, s. 18; Law of Property Act, 1925, s. 177.

² As Sir F. H. Jeune thought; *In re Martin, Loustalan v. Loustalan*, [1900] P. 211, 223.

³ [1900] P. 211, 240; *supra*, p. 51.

Here the question as to revocation is governed by English law as being the law applicable to all matters concerning the matrimonial régime.

The remaining question is whether the law as above stated is affected by section 3 of Lord Kingsdown's Act, which provides that no will shall be revoked by a subsequent change of domicile.¹ It is difficult to appreciate what effect the statute can have on the matter. Westlake, however, writes as follows:

Is this doctrine affected by Lord Kingsdown's Act?

'If the testator marries after changing his domicile, and the marriage would revoke his will by the law of his last domicile, but not by that under which he was domiciled at the time when he made his will, the will is not revoked.'²

The words 'last domicile' are obscure, but what he appears to maintain is, for instance, that if a Frenchman makes a will while domiciled in Scotland and then, having acquired an English domicile, marries in England, the will is saved from revocation by the operation of the third section.

This would appear to be an erroneous view. Even if a British subject were to make a will while domiciled, for instance, in Scotland, and were then to marry in England after acquiring an English domicile, it is reasonably clear that the will would not be saved from revocation by the third section. For one thing, the operation of a matrimonial rule can scarcely be affected by a testamentary statute.³ For another, section 3, since it refers to a mere change of domicile, cannot reasonably be extended to a case where in addition there is some further act, such as an express revocation, or an implied revocation by marriage.

Two decisions are said to justify Westlake's statement.

In the case of *In the Goods of Reid*,⁴ a British subject while domiciled in Scotland made a settlement in Scotland, which was a valid will by Scottish law though not by English law. He then married, being still domiciled in Scotland. He died domiciled in England. Held—that the will was not revoked by the change of domicile.

In the Goods of Reid

Once it was admitted that a rule of this nature falls within the sphere of matrimonial law, it could scarcely be contended that the marriage effected a revocation, for the only law which was entitled to speak, i.e. the matrimonial law of Scotland, denied such a result.

¹ *Supra*, p. 536.

² S. 86.

³ Morris, *Cases on Private International Law*, pp. 344-5; Dicey, p. 841.

⁴ (1866), L.R. 1 P. & D. 74.

*In the
Estate of
Groos*

The second case—*In the Estate of Groos*¹—has already been discussed,² and all that need be recalled is that in the circumstances section 3 was entirely irrelevant, since it fell to Dutch law alone to determine the effect of the marriage upon the will. A later change of domicile could not affect the position. The view expressed in the judgment, therefore, that the case fell within the general terms of the section, was superfluous.

The submission, then, is that the rule relating to revocation of a will by marriage, since it falls within the sphere of matrimonial law, cannot be affected by any law, statutory or otherwise, the province of which is to regulate testamentary succession.³

*Lex domici-
cillii at time
of revoca-
tion appears
to govern*

Revocation by some act other than marriage. What the law is that governs this matter is practically destitute of authority.⁴ Is it the *lex domicilii* of the testator at the time of revocation or at the time of his death? The matter ceases to be academic if his domicile is not the same at the two moments, for what is an effective revocation by one law is frequently ineffective by another.

Most writers favour the *lex domicilii* at death,⁵ but it is difficult to agree that this represents the sound principle. It seems to be based upon the strange theory that a mere change of domicile can have a retroactive effect upon a completed transaction. The testator intends to revoke his will. He carries out his intention by the performance of the act which is regarded as essential and effective by the law to which he is at the moment subject. The mind recoils from the suggestion that the effect of this act within the law may be nullified or changed if, at some later period in his life, he happens to become subject to a different personal law. It requires something more than this to undo what has been lawfully and intentionally done in the past. The *lex domicilii* at death can scarcely be the sole law entitled to govern the matter.

It would seem that the governing law must be considered in the light of the method of revocation. A will is revocable either by a later will or by some other act such as the destruction of the original document.

*Express
revocation
by will*

A testamentary revocation is obviously effective, if it is express and if it is contained in a will that is formally valid according to the proper law that governs the form of testamentary execution.⁶

¹ [1904] P. 269.

² *Supra*, p. 538.

³ But see 3 *I.L.Q.R.* 348–50.

⁴ For a full discussion of revocation see Johnson, *The Conflict of Laws*, pp. 102–14; Theobald on *Wills* (11th ed.), pp. 5–7; Dicey, pp. 835 et seqq.

⁵ Beale, s. 307. 1; Goodrich, p. 519; Wolff, s. 569. *Contra*, Dicey, p. 835; Stumberg, p. 394; Johnson, *op. cit.*

⁶ *Cottrell v. Cottrell* (1872), 2 P. & D. 397.

In other words, it is effective if it complies with the forms required by the *lex domicilii* of the testator at the time of his death, or, in the case of a British subject, with those required by any one of the alternative systems of law permitted by Lord Kingsdown's Act.

But it does not necessarily follow that a revocation is ineffective merely because it is ineffective by the law that governs the form of testamentary execution. Suppose that:

A testator, not a British subject, makes a will valid according to English law while he is domiciled in England. He then acquires a domicile in Quebec and makes a holograph will there, revoking all former wills. He later dies domiciled in England.

If the decisive date in these circumstances is the date of death, then the first will must stand, for the holograph will, though valid by Quebec law, is invalid by the *lex domicilii* at death. Nevertheless, for the general reasons given above, it is submitted that the revocation should be regarded as effective, on the ground that it complied with the *lex domicilii* of the testator at the time of its completion. That a solemn and deliberate act by the testator, performed according to the only law applicable to him at the time, should be cancelled by a mere change of domicile, and that in consequence his fortune should be distributed in a manner probably destructive of his wishes and expectations, seems to be required neither by reason nor by principle.

That the time of revocation is the decisive date seems even more apparent in the case of revocation by the destruction of a will. The difference between the internal systems of England and Quebec provides an illustration of the matter. By English law a will is revoked if it is destroyed by a third person in accordance with the intention, and in the presence, of the testator. Quebec law regards the revocation as effective even though the testator is not present at its destruction. If therefore a will is destroyed by an agent in pursuance of instructions given to him by a testator domiciled in Quebec, it would be perverse to contend that, should its contents be ascertainable, it would be revived were the testator to die domiciled in England.

Revocation
by destruc-
tion

CHAPTER XVI

THE LAW OF IMMOVABLES

- I. In general immovables are governed by the *lex situs*. Pages 554-81.
 1. Jurisdiction. Pages 556-62.
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I. IN GENERAL IMMOVABLES ARE GOVERNED BY THE *LEX SITUS*

Universal
application
of *lex situs*

IN the United States of America and in European countries with few exceptions,¹ the general rule is that the *lex situs* is the governing law for all questions that arise with regard to immovable property:²

‘The consent of the tribunals,’ says Story,³ ‘acting under the common law, both in England and America, is in a practical sense absolutely uniform on the same subject. All the authorities in both countries, so far as they go, recognize the principle in its fullest import, that real estate, or immovable property, is exclusively subject to the laws of the government within whose territory it is situate.’

The rule was authoritatively stated for English law in *Nelson v. Bridport*,⁴ where Lord Nelson, in his capacity as Duke of Bronte, had attempted to devise his Sicilian estate in a manner contrary to the law of Sicily. Lord Langdale M.R. said:⁵

‘The incidents to real estate, the right of alienating or limiting it, and the course of succession to it, depend entirely on the law of the country where the estate is situated. Lord Nelson having accepted the Sicilian estate could deal with it only as the Sicilian law allowed; he had a right to appoint a successor, but no right to modify the estate, interest, or powers of disposition to which the successor was entitled by the law

¹ Exceptions are Italy (see *In re Ross*, [1930] 1 Ch. 377, *supra*, p. 79), Spain, Sweden, Finland, Czechoslovakia and Germany, where succession to immovables is governed by the *lex patriae* of the deceased owner.

² This proposition is so clear as scarcely to require authorities, but see *Birt-whistle v. Vardill* (1839), 7 Cl. & F. 895; *Coppin v. Coppin* (1725), 2 P. Wms. 291; *In re Duke of Wellington*, [1947] Ch. 506; [1948] Ch. 118; Dicey, Rule 127, p. 529; Westlake, s. 156; Foote, p. 223; Story, ch. x; it is equally recognized in India, *Bonnaud v. Charriol* (1905), 1 L.R. 32 Calc. 631.

³ S. 428.

⁴ (1845), 8 Beav. 547.

⁵ At p. 570.

of Sicily. The successor became the holder of the estate subject to the incidents annexed to it by the grant and the law of Sicily and no others. Amongst the incidents was a particular course of succession different from that which Lord Nelson had directed, and the necessary consequence appears to be that no operation or effect could be given to the expressed wish and intention as to the succession to the estate itself, beyond that which the law of Sicily allowed.'

Before giving specific illustrations of the doctrine in operation it is essential that the true meaning of the expression *lex situs* ^{Meaning of *lex situs*} should be understood. Most decisions and most writers have proceeded upon the assumption that it means the relevant rule applicable at the *situs* to a purely domestic situation involving no foreign element at all. The assumption, however, is scarcely warranted. This, as we have seen in considering the *renvoi* doctrine, is one of those exceptional cases in which the court of the forum refers to the whole law of the foreign *situs*.¹ It may be that a court at the *situs*, if required to give a decision, would apply the relevant rule of its own law applicable to a purely domestic situation. This, however, is not necessarily so. The relevant rule should be examined in the light of its reason, the purpose which it is designed to effect and the policy upon which it is based, in order to ascertain whether it is properly applicable to a case containing a foreign element. It does not follow that a rule of the land law designed to promote the welfare of persons domiciled in the country or to regulate local transactions should necessarily be extended to transactions completed abroad between domiciled foreigners. The truth of this is well brought out by Cook in his discussion of the New Hampshire case of *Proctor v. Frost*,² where the facts were these:

By the statutory law of New Hampshire a wife is incapable of becoming surety for her husband, but by the law of Massachusetts she is free from this incapacity. A married woman entered into a transaction in Massachusetts, where she was domiciled, by which she became surety for her husband. By way of security she executed in that State a mortgage of her land in New Hampshire.

There was no dispute that her capacity to execute the mortgage as a surety fell to be determined by the *lex situs*, but that did not inevitably mean that the New Hampshire statute applied to the instant case. A correct decision on that question could scarcely be reached without first considering the purpose of the

¹ *In re Schneider's Estate* (1950), 96 N.Y.S. 652; Cheatham, p. 67; *supra* pp. 85-86.

² [1938] 89 N.H. 304; Cheatham, *Cases on Conflict of Laws*, p. 574; Cook, *Logical and Legal Bases of Conflict of Laws*, p. 274.

statute. Was this purpose to regulate the conveyance of New Hampshire land, or was it to protect wives against the importunities of embarrassed husbands? If it was the latter, it would be unseemly and inexpedient to extend this paternal solicitude to wives domiciled in foreign jurisdictions. In the result the Supreme Court of New Hampshire considered that the object of the statute was to protect married women within the jurisdiction, and they therefore held the mortgage to be valid. This decision stands out as one of the few in which the matter has been approached in this manner. It will be found, almost without exception, that the term *lex situs* is interpreted in its narrow literal sense as meaning that rule which applies to an analogous situation free from all trace of foreign elements. This narrow meaning must, of course, be adopted when the dispute concerns the legal effects of a conveyance, as, for example, when the question is whether there has been an infringement of the rule against perpetuities or whether the interest created is legally possible,¹ but there is no reason why it should be regarded as the only possible meaning. *Chiwell v. Carlyon*² is one of the few cases in which a more liberal construction was put upon the term *lex situs*. In exceptional cases there may be a local statute which delimits the sphere of operation of some rule of the *lex situs*. An instance of this is the Inheritance (Family Provision) Act, 1938,³ which empowers the Chancery Division to order that reasonable maintenance for dependants shall be made out of the estate left by the deceased. The Act is expressly limited to persons who die domiciled in England. Therefore, the result of this 'choice of law' clause is that if, for example, a testator dies domiciled in Scotland, the court has no jurisdiction to order maintenance out of land that he leaves in England.⁴

Modifica-
tion of the
general
principle
in equity

The doctrine that the *lex situs* governs immovables is subject to modification in certain cases where an action concerning a right of property is affected by some personal element arising from contract, tort, breach of trust and similar phenomena, but before dealing with these⁵ it is necessary to examine rather more closely particular applications of the overriding principle.

1. *Jurisdiction.*

Court of
situs alone
competent

An English court has no jurisdiction to adjudicate upon the right of property in, or the right to possession of, foreign im-

¹ Cook, *op. cit.*, p. 270.

² *Supra*, p. 507.

³ 1 & 2 Geo. VI, c. 45.

⁴ 62 *L.Q.R.* 178-9.

⁵ See *infra*, pp. 582 et seqq.

movables, even though the parties may be resident or domiciled in England.¹ This rule is generally based upon the practical consideration that only the courts of the *situs* can make an effective decree with regard to land.

‘In respect to immovable property,’ said Meili,² ‘every attempt of any foreign tribunal to found a jurisdiction over it must, from the very nature of the case, be utterly nugatory, and its decree must be for ever incapable of execution *in rem*.’

It was at one time thought, however, that as regards this country the rule was not based on substantial grounds, but was due to the technicalities of the English law of procedure. In early days juries were chosen from persons acquainted with the parties and with the merits of a case, and it was one of the strictest rules of procedure that litigants should lay the *venue* with exactness, i.e. should state with the utmost certainty the place where the facts giving rise to the dispute had arisen. The *venue*, or the place from which the jury was summoned, had to be the place where the cause of action arose. This meant, of course, that it was impossible to entertain an action in England which related to foreign land. A distinction, however, was later made between local and transitory actions. If a cause of action was one that might have arisen anywhere, it was *transitory*; if it was one that could have arisen only in one place, it was *local*. In local matters, such as claims to the ownership of land, the *venue* had still to be laid with accuracy, but in transitory matters the plaintiff was allowed to lay the *venue* where he pleased. Local *venues* were abolished by the Judicature Act and by the Rules made thereunder, and the rule now is that ‘in every action in every Division the place of trial shall be fixed by the court or judge’.³ This abolition of local actions removed the technical objection to the possibility of bringing an action in respect of foreign immovables before an English court, and it was not long before it was suggested, and indeed decided, that such actions could now be entertained. This argument was strongly pressed in *British South Africa Company v. Companhia de Moçambique*.⁴

Absence of jurisdiction formerly based upon doctrine of *venue*

This was an action of trespass brought against the defendants for

¹ *British South Africa Co. v. Companhia de Moçambique*, [1893] A.C. 602; *Deschamps v. Miller*, [1908] 1 Ch. 856, per Parker J.

² *International Civil and Commercial Law*, Eng. tr. (1905), p. 279.

³ R.S.C., O. xxxvi, R. 1. For the history and a full account of the subject see the notes to *Mostyn v. Fabrigas* in Smith's *Leading Cases* (12th ed.), i. 615–19.

⁴ [1893] A.C. 602.

having broken into and taken possession of large tracts of lands and mines in South Africa.

The Court of Appeal held that, local *venues* having been abolished, such an action could properly be brought here.¹ The House of Lords, however, reversed this decision and held that an English court has no jurisdiction to entertain a suit with respect to foreign immovables, and, moreover, it finally dispelled the idea that this principle ever rested upon a technical rule of procedure.

'My Lords,' said Lord Herschell in his speech, 'I have come to the conclusion that the grounds upon which the courts have hitherto refused to exercise jurisdiction in actions of trespass to land situate abroad were substantial and not technical, and that the rules of procedure under the Judicature Act have not conferred a jurisdiction which did not exist before.'

Jurisdiction excluded in two cases Stated more explicitly, what this decision signifies is that the jurisdiction of the court is barred only where the action raises one or other of two issues, namely,

first, the title to, or right to possession of, land abroad;
secondly, the recovery of damages for trespass to such land.²

(1) Action founded on a disputed claim of title The exclusion of jurisdiction in the first type of action is fully justified, for what is at stake is a disputed claim of title and any judgment *in rem* that might be given would be totally ineffective unless it were accepted and implemented by the authorities in the situs. Examples of a refusal of jurisdiction on this ground are:

a suit for the partition of land in Ireland;³
an action to test the validity of a devise of land situated in Pennsylvania;⁴
an action⁵ or a petition of right⁶ to recover possession of Colonial land;
a suit to obtain inspection of documents, possessed by the defendant in England, in aid of an action for the recovery of land which was pending in India.⁷

On the other hand, there is no objection to an action for the

¹ [1892] 2 Q.B. 358.

² *St. Pierre v. South American Stores (Gath and Chaves) Ltd.*, [1936] 1 K.B. 382, at p. 396, *per* Scott L.J.

³ *Cartwright v. Pettus* (1676), 2 Cas. in Ch. 214.

⁴ *Pike v. Hoare* (1763), Amb. 428.

⁵ *Roberdeau v. Rous* (1738), 1 Atk. 543.

⁶ *In re Holmes* (1861), 2 John and H. 527.

⁷ *Reiner v. Marquis of Salisbury* (1876), L.R. 2 Ch. D. 378.

recovery in England of a rent service issuing out of foreign land, for such an action by a lessor against his lessee is personal and is in no sense founded on a disputed claim of title to the land.¹

A question that has arisen at least once is whether an action to recover arrears of rent charged on land abroad is maintainable in England. In *Whitaker v. Forbes*:² Is a rent-charge recoverable?

An English testator devised land in Australia to the defendant, but charged it with the payment of an annuity of £500 to the plaintiff.

An action to recover arrears of this rentcharge inevitably failed, for it had been commenced before the abolition of the rules of *venue* by the Judicature Act and thus the court had no option but to enforce the technical rule that the action was local and therefore not maintainable. Lord Cairns, however, remarked that it might possibly be maintainable in the future.³ In this particular case, of course, the defendant, having assumed no contractual obligation, was liable solely on the ground of privity of estate arising from his possession of the land, and there can be no doubt that a liability which rests upon privity of contract, as where a borrower charges his land with the repayment of the loan, will be enforceable in English proceedings.

There are two exceptions to the principle that a possessory or proprietary title to foreign land is not justiciable in England. Two exceptions

(a) If the conscience of the defendant is affected in the sense that he has become bound by a personal obligation to the plaintiff, the court, in the exercise of its jurisdiction *in personam*, will not shrink from ordering him to convey or otherwise deal with foreign land. This doctrine, which was established in *Penn v. Baltimore*, is discussed in more detail below.⁴ (a) Action founded on a personal obligation

(b) The second exception, which lacks direct authority but which undoubtedly exists in practice, is apparent from such well-known cases as *In re Duke of Wellington*⁵ and *Nelson v. Bridport*,⁶ to take only two examples.⁷ In each of these cases jurisdiction was assumed although quite clearly the title to foreign land was the matter in dispute. Since parties cannot (b) Question affecting foreign land arising incidentally in English action

¹ *St. Pierre v. South American Stores (Gath and Chaves) Ltd.*, [1936] 1 K.B. 382.

² (1875), L.R. 1 C.P.D. 51.

³ *Ibid.*, at p. 52.

⁴ *Infra*, p. 582.

⁵ *Supra*, p. 83.

⁶ *Supra*, p. 554.

⁷ See also, *In re Piercy*, [1895] 1 Ch. 83; *In re Hoyle*, [1911] 1 Ch. 179; *In re Ross*, [1930] 1 Ch. 377, *supra*, p. 79.

consent to the exercise of a jurisdiction which the court admittedly does not possess,¹ how is this divergence from the general principle to be explained? The usual explanation is that if an estate or a trust, which includes English property and foreign immovables, is being administered in English proceedings, the court is prepared to determine a disputed title to the foreign immovables.² Perhaps it was this practice that Lord Herschell had in mind when he said:

'It is quite true that in the exercise of the undoubted jurisdiction of the courts it may become necessary incidentally to investigate and determine the title to foreign lands; but it does not seem to me to follow that because such a question may incidentally arise and fall to be adjudicated upon, the courts possess, or that it is expedient that they should exercise, jurisdiction to try an action founded on a disputed claim of title to foreign lands.'³

Although a stern critic might detect a certain inconsistency in the statement and might even question whether the title to the Spanish land in the *Wellington Case* was a mere incident in the proceedings, there is no doubt that in the course of dealing with such a matter as a trust or a will subject to English law the courts have in fact not hesitated to determine the title to foreign land. The jurisdictional difficulty that arises appears to have been canvassed only once,⁴ and all that can be said is that the practice comes perilously near to destroying the supposedly universal principle that jurisdiction concerning the title to, or possession of, immovables, resides only in the *forum rei sitae*.

¹ Duncan and Dykes, *Principles of Civil Jurisdiction*, p. 258; see also the doubt expressed by Somervell L.J. in *The Tolten*, [1946] P. 135, at p. 166.

² 64 L.Q.R. 268 (J. H. C. Morris); Graveson, *op. cit.*, p. 317. Dr. Morris suggests that the English and foreign property must be subject to similar limitations, *sed quaere*.

³ *British South Africa Co. v. Companhia de Moçambique*, [1893] A.C. 602, 626. See also the remark of Westlake, *op. cit.*, para. 173, where he says that the English court may perhaps assume to determine the right to the property or possession of foreign immovables 'on the ground of movable property being mixed up in the same proceedings'.

⁴ *In re Duke of Wellington*, [1948] Ch. 118, 120, where in the course of argument before the Court of Appeal the court raised the question of jurisdiction in regard to the Spanish will. 'The matter was argued at some length, but it was ultimately arranged that the court would deal with the matter on the footing that the law of England applied, the parties expressing their willingness to be bound by the decision.' It is perhaps regrettable that this arrangement has been reported, for it gives the impression that if the parties consent the court can arrogate a jurisdiction that it does not possess. It must be admitted, however, that this was done in *The Mary Moxham* (1876), 1 P.D. 107.

The second type of proceeding that falls under the ban imposed by the *Moçambique rule* is an action to recover damages for a trespass to foreign land or for loss caused by such acts as waste or injurious flooding. This ban has little to commend it and in some countries it has been repudiated.¹ Probably the sound distinction is that made by Lord Mansfield—between actions *in rem* where the judgment cannot be effective unless the subject-matter lies within the control of the court, and actions against the person in which only damages are claimed.² An action for injury to land, whether trespass or case, falls within the latter class.

(2) Action
of trespass

An exception to the rule that the English court takes no cognizance of a trespass to foreign land was, however, recognized by the Court of Appeal in *The Tolten*,³ where an Admiralty action *in rem* was successfully brought against the owners of a ship to recover damages for injury caused by negligent navigation to a pier at Lagos. The court held that the procedural ban clearly and finally imposed by the *Moçambique rule* in the case of an action at common law does not apply to a case where the High Court exercises its admiralty jurisdiction.

Admiralty
Court has
jurisdiction
in trespass

Scott L.J. was at pains to demonstrate that the *Moçambique rule* is incompatible both with the exercise of admiralty jurisdiction and with the general law of the sea. He rested his decision upon two main reasons.

Decision of
Court of
Appeal in
The Tolten

First, he said it would be inconsistent to exclude a jurisdiction, which admittedly embraces the high seas below bridges in any part of the world, merely because the damage complained of is a trespass to foreign land.

Secondly, he emphasized how important it is that the essential nature of the maritime lien, as recognized by the nations which apply the general law of the sea, should not be repudiated by English courts. The universal law is that a person injured by a negligent ship acquires a lien which adheres to the ship until discharged, and which is available to the creditor against even a purchaser for value. To subject this vested right to a restriction peculiar to the common law of England would be to create an unwarranted divergence from

¹ For example, New York, Minnesota and Arkansas, see 66 *Univ. of Pennsylvania Law Review*, 301; *ibid.*, vol. 73, p. 19; 6 *Vanderbilt Law Review*, 786.

² *Mostyn v. Fabrigas* (1774), 1 Cowp. 161, 180-1. This view was later rejected, *Doulson v. Matthews* (1792), 4 T.R. 503, where the technical rule that an action *quare clausum fregit* was local was rigidly applied. On the subject generally see Hancock, *Torts in the Conflict of Laws*, pp. 95 et seqq.

³ [1946] 1 All E.R. 79; affirmed, [1946] P. 135.

the general law. To subject it to the *Mozambique rule* would not only constitute a serious invasion of the creditor's right but might well produce a ridiculous situation.

'Suppose,' says the learned Lord Justice, 'ship *A* by one and the same act of negligent navigation at Lagos to have caused injury to (1) the plaintiff's wharf, (2) merchandise on the wharf, (3) people on the wharf, (4) ship *B* lying near the wharf. On these assumed facts, the injured parties numbers 2, 3 and 4 can conduct a suit *in rem* in the admiralty court, but if the *Mozambique rule* is applied, number 1 is barred.'¹

2. Capacity to take and transfer immovables.

Capacity to take land Unless a person has capacity by the *lex situs* to take immovables, he will be excluded from ownership.

'Thus if the laws of a country exclude aliens from holding lands, either by succession or by purchase or by devise, such a title becomes wholly inoperative as to them, whatever may be the law of their domicile.'²

In *Duncan v. Lawson*,³ for instance, it was admitted that a bequest by a domiciled Scotsman of English leaseholds to trustees upon trust for sale and out of the proceeds to pay certain legacies to charities was void as infringing the Mortmain and Charitable Uses Act, for whether a charity was competent to take English freeholds and leaseholds, even under a foreign will, must depend upon English law.

Capacity to transfer land The same is true of capacity to transfer immovables, whether by sale, gift, mortgage or devise.⁴ If full age is attained in country *A* at 21 and in country *B* at 25, a person 22 years old, domiciled in *A*, cannot execute a valid conveyance of lands lying in *B*; whereas a person of the same age, even though domiciled in *B*, can effectually convey land in *A*.⁵

Lex situs governs It was definitely established by *Bank of Africa Ltd. v. Cohen*⁶ that this rule is part of English law, though it would seem that the case raised a question of form rather than of capacity. The facts were these:

The defendant, a married woman domiciled in England, entered into a deed in England by which she agreed to make a mortgage of her land at Johannesburg in favour of the plaintiffs. The mortgage was intended to secure money lent to her husband. The Roman-Dutch law

¹ *The Tolten*, [1946] P. 135, 146-7.

² Story, s. 430.

³ (1889), 41 Ch.D. 394.

⁴ Story, s. 431.

⁵ Cp. *Sell v. Miller* (1860), 11 Ohio State 331; Beale, ii. 25; Lorenzen, p. 564.

⁶ [1909] 2 Ch. 129.

prevailing in the Transvaal ordains that a married woman cannot be bound as a surety unless she specifically renounces the benefits of the *Senatusconsultum Velleianum*, and also the benefits of another law, *de authentica*. The evidence went to show that this renunciation had not been made in the formal manner required by the local law, since the deed had not been read over and explicitly explained to the defendant before execution by her. In an action brought in England for specific performance of the English transaction, judgment was given both by the court of first instance and also by the Court of Appeal in favour of the defendant.

The decision in both courts was based upon the defendant's lack of capacity. Thus Eve J. said:¹

'The court in dealing with a contract relating to immovables is bound to determine this question of capacity by the *lex situs*, and if the *lex situs* shows that the contracting party had not the capacity to contract, the whole contract is void, and nothing can be done in this country to enforce that contract against the contracting party.'

Again, in the words of Buckley L.J.:²

'Mr. Dicey's language I think is correct, that a person's capacity to make a contract with regard to an immovable is governed by the *lex situs*.'

This decision is far from satisfactory. If the facts raised a true question of capacity, it did not follow that the object of the South African rule was to protect married women domiciled in other countries.³ If a question of form was involved, it is difficult to distinguish the case from that of *Ex parte Pollard*, where a contrary decision was reached.⁴ Again, since the married woman had made a contract valid by English law, the proper law, was she not bound to do everything required by South African law to render it effective?

3. *Formalities of alienation.*

The formal validity of a transfer of immovables is determined by the *lex situs*.⁵ This is generally taken to mean that a transfer *Lex situs governs*

¹ At p. 135.

² At p. 143.

³ See this aspect of the matter discussed above, pp. 555-6.

⁴ (1840), Mont. & Ch. 239; *infra*, p. 587.

⁵ Story, s. 435; Dicey, 533; 20 *Yale Law Journal*, 427; *Robinson v. Bland* (1760), 2 Burr. 1077, 1079, *per* Lord Mansfield. But by virtue of Lord Kingsdown's Act, 1861, s. 1 (*supra*, pp. 533 et seqq.), if a British subject makes a will out of the United Kingdom purporting to dispose of *leaseholds* in England, the will may be valid even though not executed in accordance with the formalities prescribed by the *lex situs*: *Re Grassi, Stubberfield v. Grassi*, [1905] 1 Ch. 584.

must comply with the formalities prescribed by the internal law of the *situs* for a purely domestic transaction containing no foreign element. Thus it has been held in a case decided before the Wills Act, 1837, that a devise which was valid by the *lex domicilii* of the testator was ineffectual to pass English land, since it was not attested by three witnesses as required by the Statute of Frauds.¹ Nevertheless, it does not inevitably follow that a local formality must in all circumstances be observed. Everything depends upon how it is regarded by the *lex situs* itself. This law may, indeed, regard it as essential for every conveyance, no matter where or by whom executed. On the other hand it may regard the formality as necessary only for conveyances completed within the jurisdiction.²

A contract to transfer governed by a different principle The universal recognition that the *lex situs* is paramount in this respect does not, however, conclude all difficulties. The generality of the rule and the sweeping manner in which it is usually stated are apt to lead to error unless we notice the distinction between an actual transfer of land and a contract to transfer.³ Any transaction or instrument which purports to change, then and there, the ownership of immovables must satisfy the formal requirements of the *lex situs*. But a different position arises where the inquiry relates, not to the actual transfer of some interest, but to the rights and liabilities of the parties under a contract relating to immovables. Is a contract by *A* that he will transfer some interest in land to *B* necessarily and exclusively to be governed by the *lex situs*?

Suppose, for instance, that *A* and *B* make a contract in England whereby *A* agrees to grant a mortgage to *B* of land situated in South Africa. If the contract is valid by English law but is not in the form required by South African law for the creation of a mortgage, will an English court uphold the contract, or will it refuse to do so on the ground that the formalities of the *situs* have not been satisfied?

On principle of formal validity of such a contract governed by its proper law Jurists give varying answers to the question. Thus, in the eighth edition of Story's *Commentaries* it is stated that 'as to immovables, no contract is binding or obligatory unless the contract is made with the forms and solemnities required by the local law where they are contracted (*lex situs*)'.⁴ It seems

¹ *Coppin v. Coppin* (1725), 2 P. Wms. 291; 24 E.R. 735.

² Cook, *op. cit.*, pp. 265 et seqq.; cf. *supra*, pp. 555-6. In the U.S.A. many statutes have expressly provided that a transfer shall be valid if the formalities of the place of execution are observed.

³ Dicey, p. 534.

⁴ By Bigelow, s. 372 *f.* The word 'contracted' is curious.

reasonably clear, however, that this is incorrect in principle and that it does not represent the law either of England or of North America. A contract is binding, so far as relates to form, if it satisfies the requirements of the *lex loci contractus*, or its proper law.¹ If *A* and *B*, two domiciled Englishmen, make a contract in London in such terms that its proper law is that of England, there is no doubt that it is exclusively subject to English law. The mere fact that it relates to foreign land ought not to affect the contractual rights and liabilities of the parties. If it is one whereby *A* has agreed to grant to *B* a mortgage of South African land, an action for breach of contract in the English court will succeed against *A*, even though the same action might fail in South Africa. The court cannot, of course, adjudge that *B* has actually acquired the rights of a mortgagee, for such acquisition necessitates the observance of certain local formalities, but it can decree that *A* shall do all that is necessary by South African law to make *B* mortgagee of the land. The true position, for instance, in *Bank of Africa Ltd. v. Cohen*² would seem to have been that the defendant was contractually bound to grant the mortgage, and that there was no reason why she should not do so. The renunciation required by South African law was within her power, and she had, in effect, agreed to make that renunciation in the proper form.

'Thus a contract', says Burge,³ 'to sell . . . real property will be valid if the solemnities are observed which are required by the law of the place where the contract is made, and will be the foundation of a personal action against the party to that contract to compel the transport of such property; but no transport will be complete, nor will the dominium in the property have been transferred or acquired, unless those solemnities are observed which are required by the law of the place where it is situated.'

This view was adopted by the Supreme Judicial Court of Massachusetts in an action for breach of covenant, made in North Carolina by parties there domiciled, by which a husband agreed to surrender all his marital rights in certain lands possessed by his wife in Massachusetts.⁴ In the course of his judgment Holmes J. said:

'It is true that the laws of other states cannot render valid conveyances of property without our borders which our laws say are void, for

¹ *Supra*, pp. 288-9.

² *Supra*, p. 562.

³ Vol. i, part i, c. i.

⁴ *Polson v. Stewart* (1897), 167 Mass. 211; Lorenzen, *Cases on the Conflict of Laws*, p. 552.

the plain reason that we have exclusive power over the *res*. But the same reason inverted establishes that the *lex rei sitae* cannot control personal covenants not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it. Whatever the covenant, the laws of North Carolina could subject the defendant's property to seizure on execution, and his person to imprisonment, for a failure to perform it. Therefore, on principle, the law of North Carolina determines the validity of the contract.'

The rule of
English
law

The same view is now taken by English law and it is succinctly stated by Westlake:¹ 'Contracts relating to immovables are governed by their proper law as contracts, so far as the *lex situs* of the immovables does not prevent their being carried into execution.' In *British South Africa Company v. De Beers Consolidated Mines Ltd.*,² Cozens-Hardy M.R. said:

'In my opinion an English contract to give a mortgage on foreign land, although the mortgage has to be effected according to the *lex situs*, is a contract to give a mortgage which—*inter partes*—is to be treated as an English mortgage, and subject to such rights of redemption and such equities as the law of England regards as necessarily incident to a mortgage.'

It might, perhaps, be objected that this case and Westlake's statement refer to the essential, rather than to the formal, validity of a contract, but it would seem that *In re Smith, Lawrence v. Kitson*³ conclusively supports the view that a contract to transfer an interest in land, sufficient as regards form by its proper law or by the *lex loci contractus* but insufficient by the *lex situs*, is enforceable.

In that case the testator had executed a deed in England by which he charged his land in the West Indies as security for the repayment to his sisters of £1,000, and agreed to execute a legal mortgage whenever required to do so. This deed was not sufficient by the *lex situs* to constitute a valid incumbrance upon the land. In an administration action brought against the trustees of the will it was held that the sisters were entitled to have a legal mortgage executed in their favour according to the requirements of the local law.

Distinction
between
capacity
and formal
validity

It would seem, on principle, that the same distinction between an actual transfer and a contract to transfer must also be relevant in a question of capacity. Where a person contracts in one country to transfer land in another country his capacity should

¹ S. 216.

² [1910] 2 Ch. 502, 514. This decision was subsequently reversed, [1912] A.C. 52, on grounds, however, which do not affect the above statement.

³ [1916] 2 Ch. 206.

be tested by the proper law of the contract. The difficulty, however, of maintaining this view is that, if the contracting party were subject to some incapacity in the true sense, e.g. minority, by the *lex situs* though not by the proper law, it would be futile to subject him to a decree of specific performance that the local law would forbid him to implement. The most that could be done would be to hold him liable in damages.

4. *Essential validity of transfers.*

The general rule laid down in *Nelson v. Bridport*,¹ as we have already seen,² is that no disposition, though made in a country where it may be regular, can create an interest in immovables which is contrary to the *lex situs*. The *lex situs* obviously must decide whether an interest in land is permissible in nature or extent. That law governs exclusively the tenure, title and descent of immovables.³ Although it is a general principle that a legal title duly acquired in one country is a good title all the world over, yet, where the title concerns immovables, it must conform to the *lex situs*.⁴

“Thirdly, in relation to the extent of the interest to be taken or transferred. And here there seems a perfect coincidence between the doctrine of the common law and that maintained by foreign jurists. It is universally agreed that the law *rei sitae* is to prevail in relation to all dispositions of immovable property, and the nature and extent of the interest to be alienated.”⁵

Thus a disposition of English land, whether by will or otherwise, which contains limitations that infringe either the rule against perpetuities⁶ or the Accumulations Act⁷ is void.

A common application of the general principle occurs in the case of those restraints upon alienation which are found in most systems of jurisprudence. Prohibitions against alienation between certain persons or for certain purposes, or beyond a certain amount, are frequently met with, and in fact most of the Continental systems of law forbid testators to devise more than a certain proportion of their property. When the subject-matter of alienation is an immovable the application of such restraints depends solely upon the *lex situs*.

¹ (1845), 8 Beav. 547.

² *Supra*, pp. 554–5 et seqq.

³ *Fenton v. Livingstone* (1859), 33 L.T. (O.S.) 335.

⁴ *Simpson v. Fogo* (1863), 1 Hem. & M. 195.

⁵ Story, s. 445.

⁶ *Re Grassi, Stubberfield v. Grassi*, [1905] 1 Ch. 584, at p. 592 (Buckley J.).

⁷ *Freke v. Carbery* (1873), L.R. 16 Eq. 461.

An apt illustration is afforded by a consideration of the Mortmain statutes in connexion with a gift of land to a charity. The effect of the English statute is to prevent a devise of land to a charity, for it provides *inter alia* that an assurance of land made to such a body without valuable consideration must be made at least twelve months before the death of the assurator, must take effect in possession, and must within six months of its execution be sent to the officers of the Charity Commissioners.¹ The purpose of this restriction, which dates back to the beginning of the eighteenth century, was to prevent 'improvident alienations made by languishing or dying persons in favour of over-zealous partisans and to the disherison of lawful heirs'. Broadly speaking, the policy was, and is, to prevent the excessive accumulation of land by way of devise in the hands of perpetual bodies. If this is the policy of Mortmain statutes generally, it follows that the decisive factor in considering the validity of a charitable devise is not the domicile of the testator, but the country where the land is situated.

Thus it has been held that a devise or gift of English land contrary to the Mortmain Act, even though valid by the *lex domicilii* of the donor, is void.² The reverse situation is illustrated by *In re Hoyles*, *Row v. Jagg*,³ where

a domiciled Englishman devised a mortgage, which he held over freehold land in Ontario, to a charity in that Province. The English Mortmain Act was in force in Ontario.

Upon the assumption that a mortgage of land is regarded by the law of Ontario as a right over an immovable, the Court of Appeal held the devise to be void.

*Mayor of
Canterbury
v. Wyburn*

It is submitted that the decision of the Privy Council in *Mayor of Canterbury v. Wyburn*⁴ is inconsistent with the principle of these authorities and with the policy of the Mortmain Act.

The testator, who died domiciled in Victoria, bequeathed £10,000 to the Mayor and Corporation of Canterbury, England, for the purpose of buying a piece of land in that city which was to be devoted to charitable purposes. The bequest was valid by Victorian law.

Thus the will did not devise English land directly, but bequeathed money to be laid out in the purchase of land for the

¹ Mortmain and Charitable Uses Act, 1888, s. 4.

² *Curtis v. Hutton* (1808), 14 Ves. 537; *Duncan v. Lawson* (1889), 41 Ch.D. 394.

³ [1911] 1 Ch. 179.

⁴ [1895] A.C. 89.

charity. Such a bequest was invalid by the English statute that was in force at the time of the testator's death. The Privy Council upheld the bequest. In their view the statute struck only at the wills of domiciled Englishmen, and did not affect the general principle that a will of movables valid by the foreign *lex domicilii* of the testator is regarded as valid in England. In the instant case, it was said, the statute would not come into play until the land was actually bought. But it is better that the working of their Lordships' minds should be described in their own words:

'At what point, then, of the transactions does the English law come in? Not between the Victorian testator and his Victorian executor. In their Lordships' view the English law will operate whenever a purchase of land for the charitable use is effected, but no earlier. The assurance of that land must be made in accordance with the provisions of the Act. Anybody may give money for such a purpose in the permitted mode. The testator might himself have bought land in Canterbury and have devoted it to charitable uses quite lawfully. What he might do himself he might do through trustees, by giving money to trustees for the purpose of acquiring land in a lawful way. Is there anything to prevent him from ordering his executors to do the same thing? The answer is that his will is not affected by English law.'

This reasoning is specious. It produces a dilemma. The bequest could not be upheld without disregarding either the will or the statute. If the executors were ordered to pay the money to the corporation without any specific directions as to its employment, the statutory provisions were certainly unaffected. The corporation might purchase land lawfully, if they so chose, by obtaining the necessary authority *qua* corporation to acquire land, and by satisfying the formalities necessary in the case of an assurance of land to a charity. But, nevertheless, the intention of the testator would be defeated. Since his expressed intention was that the money should be used for one particular purpose, it would be contradictory that the legatee should be free to decide whether that purpose should be fulfilled or not. If, on the other hand, the corporation were directed to lay out the money upon the purchase of land, the testator's intention would be implemented, but the statute would be flouted.

The undeniable fact is that the testator had placed upon the enjoyment of the legacy a restraint that was void by the law of the place where the bequeathed fund was to be administered.

The earlier case of *A.-G. v. Mill*¹ (in which it was held that

¹ (1827), 3 Russ. 328; affirmed (1831), 2 Dow. & Cl. 393.

a bequest of money by a Scotsman to be expended upon the purchase of English land for charitable purposes was void) was distinguished by the Board, on the ground that the testator was domiciled in England. The place of domicil was not in fact examined in that case.

In re Piercy ¹ was a case in which an unduly ephemeral operation was allowed to the foreign *lex situs*. The facts, so far as relevant to the present discussion, were these:

A testator, domiciled in England, devised his Sardinian land to trustees upon trust for sale, and to hold the same until conversion and the proceeds of sale after conversion upon certain trusts for his children for their respective lives, with remainder to their issue. Italian law would regard the children as entitled to their shares absolutely, since it does not allow trusts of that kind to be imposed upon land in Italy.

The unsophisticated might conclude that the land must be allowed to remain subject to Italian law, and that any move to subject it, directly or indirectly, to the English trusts would be contrary to principle as being a contravention of the *lex situs*. North J., however, was of a different opinion. He admitted, indeed, that the land was subject to Italian law as long as it remained unsold, but, apart from that concession, he directed the trustees to sell the land and to hold the proceeds upon the trusts declared by the will. His reasoning, ingenious if not sound, was that by Italian law it was not illegal for the testator to direct the sale of his land, that Italian law *qua* the *lex situs* would continue to govern the land in the hands of the purchaser, but that it had nothing whatever to do with the proceeds of sale, for by that time the land would have been placed outside the scope of the will. But, by Italian law, the beneficiaries under such a disposition become absolute legal owners of the land, the executors and trustees having nothing more than a mere right of administration.² Was it not, therefore, a deliberate evasion of Italian law to place the land in the hands of a nominal owner whose true position was only that of a trustee?³

What probably weighed with the learned judge was that the land had become money under the equitable doctrine of conversion, but, as Beale points out, whether such a conversion has been effected depends upon the *lex situs*, and by Italian law the answer was most definitely in the negative.⁴

¹ [1895] 1 Ch. 83.

² Wolff, p. 592.

³ Cf. *Brown v. Gregson*, [1920] A.C. 860, at p. 886, *per* Lord Moulton.

⁴ Beale, ii. 959.

5. *Succession.*

Most foreign countries have adopted the principle of unity of succession by which questions relating to intestacy or to wills are governed by one single law, the personal law of the deceased, irrespective of the nature of the subject-matter. England, however, together with other Anglo-Saxon countries, has consistently adhered to what is called the principle of scission under which the destination of immovables on the death of the owner is governed by the *lex situs*, not by the law of his domicile as in the case of movables.¹

Two possible principles

Accordingly, where the owner of immovables dies intestate, the order of descent or distribution prescribed by the *lex situs* is applied by the English court no matter what his domicile may have been.²

Intestacy governed by *lex situs*

Thus, in an Irish case,³ a domiciled Irishman died intestate without issue in Ireland owning certain land in Victoria. In such circumstances a widow is entitled by a Victorian statute to a charge of £1,000 upon land in the colony. The land having been sold and the proceeds remitted to Ireland, it was held that the widow was entitled to the £1,000, since her rights were those conferred by the *lex situs*.

With regard to wills of immovables the rule of the common law is that it is the *lex situs*, and the *lex situs* exclusively, which decides whether the testator has capacity,⁴ whether the appropriate formalities for the making⁵ or for the revocation⁶ of a will have been observed, whether the testator has an unlimited or only a restricted power of disposition,⁷ and whether the interest devised is essentially valid.⁸ The law of the testator's domicile has no effect upon these matters, whether the subject-matter

Wills of land governed by *lex situs*

¹ For a fuller account of the opposing principles see Wolff, *op. cit.*, pp. 567 et seqq.; and 5 *I. & C.L.Q.R.*, pp. 395 et seqq.

² *Balfour v. Scott* (1793), 6 Bro. Parl. Cas. 550; *Duncan v. Lawson* (1889), 41 Ch.D. 394. When the immovables are situated in a country that adopts the principle of unity, this means that, subject to the acceptance of the *renvoi* doctrine by the *lex situs*, the order of descent may be that of England; cp. *In re Wellington*, [1947] Ch. 506; *supra*, p. 83.

³ *In re Rea*, *Rea v. Rea*, [1902] 1 Ir.R. 451.

⁴ See *In re Hernando*, *Hernando v. Sawtell* (1884), 27 Ch.D. 284, where the proposition, so far as related to the English land, was undisputed.

⁵ *Coppin v. Coppin* (1725), 2 P. Wms. 291; *supra*, p. 564.

⁶ *In the estate of Alberti*, [1955] 1 W.L.R. 1240.

⁷ Story, ss. 445 and 474, notes, citing Burge.

⁸ *Freke v. Garbery* (1873), L.R. 16 Eq. 461; *Duncan v. Lawson* (1889), 41 Ch.D. 394.

of the will is a freehold or a leasehold interest.¹ There are two exceptional cases, however, in which the *lex situs* is not decisive. The first is created by the Inheritance (Family Provision) Act, 1938.² The other occurs in the case of a bequest of English *leaseholds*, for, though the will in which this is contained does not satisfy the formalities of domestic English law, it will nevertheless be valid in respect of form, but in no other respect, if it is made by a British subject and if there has been compliance with one of the legal systems specified by Lord Kingsdown's Act, 1861.³

Effect of a
contract by
testator

The general rule, that the *lex situs* determines whether a testator is free to dispose of land which he has in terms disposed of, may, of course, be excluded by a contract previously made by him. In such a case reference must be made to the law that governs the contract. The point arose in *De Nicols v. Curlier* (No. 2).⁴

The House of Lords had decided in the first case between these parties that a marriage contract implicitly made in France, concerning the mutual rights of the spouses to the matrimonial property, was binding on movables subsequently acquired in England where the husband died domiciled.⁵ The question that now arose was whether the French contract or the English *lex situs* determined the rights of the surviving wife to the English immovables of her deceased husband. Kekewich J. held that the implied contract must operate according to the intention of the parties so as to bind the freehold and leasehold estates of the deceased, unless there was any overriding rule of English law which would render it unenforceable. The only possible rule was the provision of the Statute of Frauds requiring a written memorandum in the case of a contract concerning land, but the learned judge held that, since this particular contract constituted a partnership between the spouses in the eyes of French law, it fell within the rule of English law that a parol agreement for a partnership is not caught by the statute and is enforceable despite the lack of written evidence. The accuracy of the view expressed by the learned judge, that the contract implied by French law in-

¹ *Pepin v. Bruyère*, [1900] 2 Ch. 504; *De Fogassieras v. Duport* (1881), 11 L.R. Ir. 123; *Freke v. Carbery*, *supra*.

² *Supra*, p. 556.

³ *Re Grassi, Stubbsfield v. Grassi*, [1905] 1 Ch. 584. For the provisions of the statute see *supra*, pp. 533 et seqq.

⁴ [1900] 2 Ch. 410.

⁵ *Supra*, p. 49.

cluded foreign immovables, is open to doubt. His decision might have been based more surely upon counsel's other argument, namely, that the land represented the investment of money acquired by the husband during marriage, and that the wife could follow the money, to which she was admittedly entitled, into whatsoever form it had been converted.¹

A somewhat difficult question arises with regard to the construction of wills of immovables. We have already seen that a bequest of movables is construed according to the law intended by the testator, which is generally the law of his domicile at the time when he prepared his will.² The problem is whether the English authorities extend the same rule to wills of immovables, or whether they require that exclusive respect shall be paid to the *lex situs*.

What law governs the construction of wills?

Textbook writers are not in agreement. Dicey maintains that there is a presumption in favour of the law of the testator's domicile at the time when the will was made, though this is rebutted by evidence that he had another law in mind.³ Westlake⁴ says that no general rule can be laid down, but that a reasonable regard must be had to systems of law other than the *lex situs*. According to Halsbury's *Laws of England*, 'unless an intention to the contrary on the part of the testator is established, the construction of a will of immovables is governed by the *lex loci rei sitae*'.⁵ Story⁶ advocates the *lex domicilii*, asserting that it is that system of law which must decide, for instance, whether the terms of a will show on the part of the testator an intention to pass immovables as well as movables, whether a beneficiary is to take an estate for life or in fee, and who are the proper persons to take under some general designation such as 'heirs', 'next of kin' or children. Another learned American writer, however, says:⁷

Views of the jurists

'Public convenience requires that, in the case of rules of construction as in the case of rules of property, the rules of the *situs* should govern. To secure the expeditious and safe transfer of titles to real estate, it is far preferable that the law of the *situs* should be indiscriminately applied to all wills of real estate, whatever be the domicile of the testator, than that several wills, all containing the same language and all devising real estate in the same jurisdiction or even devising the same real estate at

¹ For a discussion of the case see Westlake, pp. 74-75.

² *Supra*, p. 546.

³ P. 547.

⁴ S. 170.

⁵ Vol. 7, p. 63.

⁶ Ss. 479 a-f; 484.

⁷ Hening in 41 *American Law Reg.* (N.S.), 623, 718, cited in Goodrich on *Conflict of Laws* (3rd ed.), p. 511.

different dates, should be differently construed by the courts of the *situs*, according as the domicils of the testators established different rules of construction.'

The State courts of America are equally disagreed, some submitting the question of construction to the *lex domicilii*,¹ others remaining staunch by the *lex situs*.²

On principle, law intended by testator governs construction. It is submitted, however, that there is little difficulty if we resort to first principles, and determine what are the natural provinces of the *lex domicilii* and of the *lex situs* respectively in this matter. It must be conceded that the object of every court in the civilized world, when dealing with a will, is first to ascertain the intention of the testator and then to give effect to that intention so far as is consonant with the governing law. In the ascertainment of this intention, where the will has reference to more countries than one, it may be a matter of great moment whether the testator's language is read in the light of this or that legal system, for it frequently happens that the same word or phrase, such as 'heirs of the body', bears a different signification in different countries. As Lord Lyndhurst said in *Trotter v. Trotter*:³

'There are certain rules of construction adopted in the courts, and the expressions which are made use of in a will, and the language of a will, have frequently reference to those rules of construction.'

It follows, therefore, in such a case that the result which the testator intended will not ensue unless we discover the system of law which he had in mind when he wrote the will. The presumption should be in favour of the *lex domicilii* at the time of the making of the will, for that is the system of law under which he lives and with which he is expected to be familiar.

'That is the law', said an American judge,⁴ 'which is constantly with him, controlling his actions and defining his rights, and more naturally than any other law would be present to his mind in the drafting of an instrument dispositive of his property.'

It may, of course, be some other system, such as the *lex situs*, for the inquiry turns wholly upon intention, just as it does when we seek the 'proper law' of a contract, and if there is any-

¹ *Guerard v. Guerard*, 73 Ga. 506; *Proctor v. Clark*, 154 Mass. 45; *Ford v. Ford*, 70 Wis. 19; *Keith v. Eaton*, 58 Kan. 732; *Lorenzen*, 788.

² *Peet v. Peet*, 229 Ill. 341; *Lorenzen*, 853; *Jennings v. Jennings*, 21 Ohio St. 56.

³ (1828), 4 Bligh 502.

⁴ *Keith v. Eaton* (1897), 58 Kan. 732; *Lorenzen*, p. 788, *per* Doster C.J.

thing clearly indicative of a desire to exclude the *lex domicilii*, the will must be construed accordingly. Thus, if a domiciled Englishman, possessing land in Scotland, were to adopt in his will the expression 'tailzied fee', it would be reasonable to conclude that he wished Scottish law to govern his disposition. Similarly if he made one will for the land and a separate will for his English property.¹

Where a testator is domiciled in one country and has land in another, the fact to be borne in mind, then, is that the *lex situs*, as such, has no paramount claim to exclusive recognition. Otherwise the result may be to defeat intention.

Law intended by the testator is not necessarily the *lex situs*

Thus, a testator frequently leaves property, not to named persons, but to those persons who would be entitled were he to die intestate. It is obvious, in such a case, that his intention is to benefit the successors admitted by the law of his domicile, since it is that system with which he is familiar, and it can scarcely be denied that arbitrarily to make a new will for him by admitting a different line of succession imposed by a foreign *lex situs*, merely because the will includes a certain amount of land situated abroad, would constitute a departure from principle.

An apt illustration is given by Burge:²

'Thus in case the limitation of a deed or will were made in England in favour of the "heir" of A, a person who had no children, and the settlor or testator has property in England, Jamaica and British Guiana, if the construction of the word "heir" was to be in conformity with the law of England, the father of A would take, if according to the law of Jamaica the elder brother, and if according to the law of British Guiana his father, brothers and sisters would take his immovable property. It is not to be presumed that he used the expression in three different senses, or that he adopted the legal import given to it by the law of the one place, rather than that given to it by the law of either of the other two places. But if his domicile were in England, there is the presumption that he was acquainted with the sense attached to it by the law of England, and that he used it in this sense.'

The adoption of this principle does not infringe any local rule of the *lex situs*, nor does it derogate from the sovereign power of the country in which the land is situated. All courts, in administering private international law, desire to give effect to expressed intentions, provided that this does not conflict with the public policy of the forum or of the *situs*, and it is a matter of indifference that A takes land under a will which has been construed according to the law of the testator's domicile,

Cases in which wills must be construed according to *lex situs*

¹ As in *In re Duke of Wellington*, [1947] Ch. 506.

² *Commentary on Colonial and Foreign Laws* (1838 ed.), vol. ii, part 2, p. 858.

though *B* would have taken had the construction been that of the *lex situs*. This, however, gives us the clue to the limits of the doctrine. If the rules of the *lex situs* make it illegal or impossible to give effect to the will as construed by the system of law intended by the testator, the general principle must perforce give way, and the construction adopted must be that of the *lex situs*. Or again, if the interest arising from a will which has been so construed possesses incidents different in the *situs* from what are recognized by the *lex domicilii*, the *lex situs* must prevail, for it is that law which determines the nature and extent of estates and interests in immovables.

We venture, then, to state the law as follows:

Rule as to
construction finally
stated

A will of immovables must be construed according to the system of law intended by the testator. This is presumed to be the law of his domicile at the time when the will is made, but the presumption will be rebutted if evidence is adduced from the language of the will proving that he made his dispositions with reference to some other legal system. If, however, the interest that arises from such construction is not permitted or not recognized by the *lex situs* the latter law must prevail.

It now remains to examine the English authorities with the view of discovering whether the principle that has been stated above is accepted in this country.

Studd
v. Cook

It was decided in *Studd v. Cook*,¹ an appeal to the House of Lords from the Court of Session in Scotland, that the size of estate which a devisee takes depends upon the law of the testator's domicile. In that case:

A domiciled Englishman, possessing land in both England and Scotland, made a will in terms appropriate to English law by which he devised all his land to the use of *X* for his life, without impeachment of waste, remainder to the use of the first and every other son of *X*, 'successively, according to their respective seniorities, in tail male'. By English law *X* took a mere life interest, but by Scottish law he was entitled to the fee simple. It was held that the English rule of construction must apply to the Scottish land. Effect had to be given to the testator's intention so far as the law of Scotland permitted.²

In re
Miller

This case is distinguishable from *In re Miller, Bailie v. Miller*,³ where a different principle was at stake.

By a trust disposition, made in Scottish form and executed in a form sufficient to constitute a valid will by English law, *A*, a domiciled Scotsman, after conferring a life interest upon his wife, gave his land in

¹ (1883), 8 App. Cas. 577.

² 40 L.Q.R. 479.

³ [1914] 1 Ch. 511. See also *Nelson v. Bridport* (1845), 8 Beav. 547; *supra*, p. 554.

Scotland and his London house 'for behoof of my eldest son, James . . . and the heirs male of his body in fee', with remainders over. James, who presumably was also a domiciled Scotsman, died without issue and without having executed any disentailing assurance of the London house. He made, however, a trust disposition in Scottish form, executed in the manner required by English law for the execution of wills, by which he disposed of the whole of his real and personal property.

By English law, as it stood, the will of James was ineffectual to pass the estate tail in the London house, which would therefore pass to the remainderman under the will of *A*. By Scottish law the will of *A* did not create a strict entail but gave James an interest which he could dispose of either *inter vivos* or by will. It was held that the question whether James had power to dispose of his London house by will must be decided according to English law.

It would seem that this decision is not inconsistent with *Studd v. Cook*. The latter case decided that the *lex domicilii* (or, more accurately, the law intended by the testator) must determine the size and nature of the interests given by a will. *In re Miller* did not raise a question of construction only. What the advocates of Scottish law attempted in effect to maintain was that *A*'s disposition did create an estate tail, but at the same time an estate tail with Scottish and not English incidents. According to Scottish law, the interest of *A* was at least a species of estate tail, for, failing a disentailing assurance or a testamentary disposition, it would pass to his male issue, or if no such issue, to the remainderman. A devisable estate tail, however, was unknown in England before 1926; and to frame a settlement under English law which would correspond to the limitations as recognized by Scottish law would be a task of extreme nicety. The question was not—Which of the various estates recognized by English law did *A* intend to create? Rather it was—Did English law recognize the estate which *A* had purported to create?

The rule that a will of immovables does not necessarily depend upon the *lex situs* receives further support from the English cases dealing with the doctrine of election.

Suppose, for instance, that a domiciled Englishman makes a will by which he devises his son's foreign land to *X* but gives £50,000 out of his own property to his son. The rule of domestic English law applicable to these circumstances is that, if the testator clearly intended to dispose of the land in favour of *X*, the son cannot claim the whole of the £50,000 unless he adopts the testamentary disposition of the land. He must elect, i.e. he must either keep the land and have the legacy correspondingly reduced, or must recognize the whole of the will by taking

Difference
between
Studd v.
Cook and *In*
re Miller

Whether
an heir
must elect
is deter-
mined by
law of
testator's
domicil

his legacy in full and abandoning the land to *X*. Election is based upon the presumption that a testator intends his will to take effect in its entirety.

The rule of English private international law is now well settled that where a testator disposes of property in more countries than one, the question whether a beneficiary is put to his election is governed by the law of the testator's domicile.¹ This is so even though the subject-matter of the election is land situated abroad, for, though the courts of the domicile cannot withhold the land from the person to whom it belongs according to the *lex situs*, they can, in the administration of the movables which is their particular province, insist that if he retains the land he shall give effect to the intention of the testator by providing compensation out of the legacy. The English court in adopting this attitude does not interfere with the *lex situs*. The foreign heir comes to the court, not as heir to the land, over which the court has no jurisdiction, but as legatee of movable property which is being administered in England. It can thus be said to him: 'We have no power to dispense with the provisions of the foreign law relating to wills of land, but you come to us as legatee under the will of a testator domiciled in England; and if you claim the legacy you must also recognize the disposition which the will has purported to make of the land.'² It is always open to the heir to ignore the English administration and to claim the land under the territorial law.³

Lex situs
does not
govern
election

If a case, then, involving the doctrine of election falls to be considered in England the court turns to the law of the testator's domicile. That domicile may be English or foreign. If it is English, the court merely considers whether the domestic doc-

¹ *Trotter v. Trotter* (1828), 4 Bligh 502; *Maxwell v. Maxwell* (1852), 2 De G. M. & G. 705; *Brodie v. Barry* (1813), 2 V. & B. 127; *Dundas v. Dundas* (1830), 2 D. & C. 349; *Orrell v. Orrell* (1871), 6 Ch. App. 302; *Dewar v. Maitland* (1866), L.R. 2 Eq. 834; *Johnson v. Telford* (1830), 1 Russ. & My. 254; *In re Ogilvie*, [1918] 1 Ch. 492. This rule was overlooked by Cohen J. in *In re Allen's Estate*, [1945] 2 All E.R. 264, as to which case see Dicey, pp. 834-5; 24 *Can. B.R.* 528 et seqq. See also the same writer in 10 *Conveyancer* (N.S.), p. 102.

² Compare the words of Lord Brougham in *Dundas v. Dundas* (1830), 2 Dow. & Cl. 349, at 375.

³ The present account of election is confined to a case where movables are bequeathed to the owner of the foreign land. In such a case the rule given above, that the *lex domicilii* governs, is correct. But it is not correct, as is pointed out in Dicey, p. 553, criticizing the third edition of this book, if English land is left to the foreign heir and foreign land left away from the heir. Here the English *lex situs* governs irrespective of domicile.

trine of election is applicable to the circumstances in question; if it is foreign, its sole guide is the law of the foreign domicil.¹ In *Balfour v. Scott*:²

A person domiciled in England died intestate leaving immovables in Scotland. The heir to the Scottish land was also one of the next of kin, and as such he claimed a share of the English movables. It was objected to this claim that by the law of Scotland an heir could not share in movables unless he consented to the immovables being massed with the movables so as to form one common subject of division. This, however, was not the English rule, and it was therefore held that the heir could take his share as one of the next of kin without complying with the rule of the *lex situs*.

So far as concerns private international law the question of election generally arises where the testator devises his own land away from the heir by a will which is void, either formally or essentially, according to the *lex situs*, but bequeaths by a valid will a legacy to the disappointed heir. The question arises here whether the heir must elect, i.e. if he claims the land on the ground that the will is invalid, can he retain the legacy in full or must he make compensation out of it to the disappointed devisee?

Questions of election where the will is void as to immovables

This situation was possible in England prior to 1837 in a purely domestic case, for, until the law was altered by the Wills Act, the formalities necessary for a valid will varied according as the subject-matter of the disposition was realty or personalty. In this state of the law it was established as early as 1749 in *Hearle v. Greenbank*³ that, if a testator devised his English freeholds to a stranger and bequeathed legacies to the heir-at-law in a will that was valid as to personalty but void as to realty, the heir was not bound to elect, unless there was an express direction that anyone who disputed any part of the will should forfeit all benefits.⁴ He was entitled both to the land and to the legacies. Although this situation can no longer arise in the case of an English will disposing of English property, it may well do so where the testator is domiciled abroad. Suppose that:

Privileged position of heir of English land

A testator domiciled in Italy makes a will by which he devises his English entailed interests to X and bequeaths a legacy to Y, who is his heir-at-law according to English law. The will is formally valid by Italian law but ineffective by English law.

¹ *Dundas v. Dundas* (1830), 2 Dow. & Cl. 349.

² (1793), 6 Bro. Parly. Cas. 550.

³ (1749), 1 Ves. Sen. 298.

⁴ *Boughton v. Boughton* (1750), 2 Ves. Sen. 12.

In such a case as this it has been held, following the principle of *Hearle v. Greenbank*, that the English heir is not put to his election.¹ He can claim the land as heir against the invalid will of realty, and retain the legacy under the bequest which, since its validity falls to be determined by the *lex domicilii*, is invulnerable. This is an example of that 'special tenderness' which the courts have always shown to the heir-at-law of English land,² though now that the heir has been abolished for fee simple estates in England it is doubtful whether a similar indulgence will be extended to those relatives who are entitled to the residuary estate of an intestate person. It is an inequitable privilege established by the courts at a time when they particularly favoured the heir-at-law and frowned upon any attempt to defeat his rights.

Foreign
heir com-
pelled to
elect

This tenderness has never been shown to a foreign heir, i.e. to the heir entitled to take foreign land under the rules of intestate succession recognized by the *lex situs*. The attitude of English law with regard to election in a case of this sort can be illustrated from *In re Ogilvie*,³ where the facts were as follows:

A domiciled Englishwoman devised her land in Paraguay to a charity and gave legacies to the persons who were the obligatory heirs of the land according to Paraguayan law. The charitable devise was void by the *lex situs* to the extent of four-fifths, which was the portion reserved for the obligatory heirs. Moreover, according to the *lex situs*, the right of an heir to his legal portion was not affected by any other benefit that he might have received under the will.

In a case of this description, English law, as being the law of the testator's domicil, determines whether the foreign heir is to be put to his election. This raises the question of construction whether the testator has manifested an intention to pass the foreign land, for if he has, then despite the invalidity of the will by the *lex situs* the doctrine of election becomes applicable.⁴ The rule evolved by English courts on this matter is that the foreign property must be described either specifically or by necessary implication.⁵ Thus, if a testator uses only general descriptive words, as, for example, where he says,

'I devise all my estate, whatsoever or wheresoever, whether in possession or revision',

¹ *In re de Virte*, [1915] 1 Ch. 920.

² *In re Ogilvie*, [1918] 1 Ch. 492, 496, per Younger J.

³ [1918] 1 Ch. 492. ⁴ *Trotter v. Trotter* (1828), 5 Bligh (N.S.), 502.

⁵ *Maxwell v. Maxwell* (1852), 16 Beav. 106; *Orrell v. Orrell* (1871), L.R. 6 Ch. 302.

he is taken to intend that his disposition shall be restricted to such land as he is empowered to pass by a will executed in that particular form.¹ There was no difficulty of this sort in *In re Ogilvie*, since the testatrix had shown a plain intention to pass the Paraguayan property, and therefore it was held that the obligatory heirs must elect between what they took by the *lex situs* owing to the invalidity of the charitable devise and what they were given in the shape of legacies by the will.

'If', said Younger J., '[the court] finds that an English testator has by his will manifested an intention to dispose of foreign heritage away from the foreign heir, and has, in fact, *so far as words are concerned*, effectually so disposed of it, this court merely says that it is against conscience that that foreign heir, given a legacy by the same will, and to that extent an object of mere bounty on the part of the testator, shall take and keep, under the protection of the foreign law, the land by the will destined for another, without making to that other out of his English legacy, so far as it will go, compensation for his disappointment, thus effectuating the testator's whole intentions.'²

The House of Lords, however, in an appeal from the Court of Session in Scotland, has held that a foreign heir will not be put to his election if it would be impossible by the *lex situs* to give effect to the disposition of the foreign land intended by the testator.³ In that case:

No election
if intended
devise
illegal by
foreign
lex situs

A domiciled Scotsman made a will by which he left his estate, including lands of great value in the Argentine, to trustees to be held by them upon certain trusts for his children. There was a provision that the trust dispositions should be accepted in full of *legitim*, and that if any child repudiated the will and claimed his *legitim* he should forfeit all title to any share of the estate which the testator was free to dispose of by will. All trusts of land are illegal in the Argentine and therefore the will was a nullity so far as the land in that country was concerned. The children, taking advantage of the *lex situs*, succeeded to the land in equal shares *ab intestato*.

It was held on these facts, Viscount Cave dissenting, that they were not bound under the Scottish doctrine of approbate and reprobate (which is analogous to the English doctrine of election) to elect between their shares of the land in the Argentine and the other benefits conferred upon them by the will.

¹ *Maxwell v. Maxwell* (1852), 16 Beav. 106.

² [1918] 1 Ch. at p. 502.

³ *Brown v. Gregson*, [1920] A.C. 860.

II. THE EFFECT OF EQUITABLE JURISDICTION IN *PERSONAM* ON FOREIGN IMMOVABLES

A Court of equity by operating in *personam* may affect foreign immovables

One result, as we have seen, of that exclusive sovereignty and jurisdiction which a State possesses within its own territory is that a court cannot, by its judgments or decrees, directly bind or affect land which lies within the confines of another State. But the reason upon which this maxim is based has no force where the issue before the court is not a *ius in rem* relating to foreign immovables, but a personal obligation enforceable against the defendant. The objection that a court has no jurisdiction owing to the foreign *situs* of the *res litigiosa* is fatal to an action *in rem*, but is no answer to an action *in personam*.

✓ 'The English Courts of Equity are, and always have been, courts of conscience operating in *personam* and not *in rem*, and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction.'¹

Defendant must be amenable to the jurisdiction

✓ The primary essential is that the defendant should be subject to the general jurisdiction of the court. This jurisdiction, as we have seen, is founded upon his presence in England, but as regards the power to pronounce a decree *in personam* against him it is equally well founded by service of notice of a writ under Order xi.²

'The moment a person is properly served under the provisions of Order xi, that person, so far as the jurisdiction of this court is concerned, is in precisely the same position as a person who is in this country.'³

Once the court is thus empowered to take cognizance of the matter, the doctrine that equity acts *in personam* may be freely and effectively applied. A decree may be issued which, though personal in form, will indirectly affect land abroad.

If, for instance, a mortgagee of land in the West Indies refuses to reconvey upon receipt of principal, interest and costs, there is no way by which a direct transfer of the property to the mortgagor can be effected at the instance of the English court. But the court can indirectly produce the desired result by saying to the recalcitrant mortgagee, 'You are subject to our jurisdiction by reason of your presence in England, and if you refuse to take the steps required by the *lex situs* for a reconveyance of the

¹ *Ewing v. Orr-Ewing* (1883), L.R. 9 A.C. 34, 40, *per* Lord Selborne.

² *Supra*, pp. 113 et seqq.

³ *In re Liddell's Settlement Trusts*, [1936] Ch. 365, 374, *per* Romer L.J.

property to the mortgagor, we shall imprison you or sequester your English property until you comply.'

'Courts of Equity have,' said Wright J., 'from the time of Lord Hardwicke's decision in *Penn v. Lord Baltimore*, exercised jurisdiction *in personam* with respect to foreign land against persons locally within the jurisdiction of the English court in cases of contract, fraud and trust, enforcing their jurisdiction by writs of *ne exeat regno* during the hearing and by sequestration, commitment or other personal process after decree.'¹

The distinction is that the court cannot act upon the land directly, but acts upon the conscience of the defendant.²

This right to affect foreign land was finally established by the decision in *Penn v. Baltimore*³ in 1750. In that case:

✓ A contract had been made in England between the plaintiff and the defendant, by which a scheme was arranged for fixing the boundaries of Pennsylvania and Maryland. To a suit for specific performance brought in this country the defendant objected that the court had no jurisdiction, since it could neither make an effectual decree nor execute its own judgment. Lord Hardwicke, while admitting that he could not make a decree *in rem*, granted specific performance, on the ground that the strict primary decree in a court of Equity was *in personam*.

The exercise of this jurisdiction, of course, is not confined to questions concerning foreign land. It extends to any case where the defendant has been guilty of conduct that in the eyes of the court is contrary to equity and good conscience. An important example of the general jurisdiction occurs where a person who is amenable to the jurisdiction commences legal proceedings abroad the institution of which is inequitable. In such circumstances the court does not hesitate to issue an injunction in restraint of the foreign proceedings, for a decree of this nature is not directed against the authority of the foreign court but merely commands a person within the English jurisdiction what he is to do.⁴

'In truth, nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative

¹ *British South Africa Co. v. Companhia de Moçambique*, [1892] 2 Q.B. 358, at p. 364.

² *Cranstown v. Johnston* (1796), 3 Ves. Jr. 170, per Sir R. P. Arden M.R. at p. 182.

³ (1750), 1 Ves. Sen. 444.

⁴ *Bushby v. Munday* (1821), 5 Madd. 297; *Portarlington v. Soulby* (1834), 3 My. & K. 104; *Carron Iron Co. v. Maclaren* (1855), 5 H.L.C. 439.

rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad—if, for instance, as in *Penn v. Baltimore*, it can decree the performance of an agreement touching the boundary of a province in North America . . . in precisely the like manner it can restrain the party within the limits of the jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the instituting or the prosecution of an action in a foreign court.¹

Even where a person has actually obtained judgment abroad, an injunction may be issued restraining him from reaping its fruits, if he has obtained it in breach of some contractual or fiduciary duty or in a manner contrary to the principles of equity and conscience.²

The jurisdiction as affecting foreign land We must now, however, confine the discussion to the manner in which the exercise of this personal jurisdiction may affect foreign land.

Must be a personal equity

The fundamental requirement is that the defendant should be subject to some personal obligation arising from his own act, for it is only when his conscience is affected that the court is entitled to interfere. There is comparative agreement among writers and judges as to the acts which impose a personal liability upon a party, sufficient to found the jurisdiction,³ but the most exhaustive statement of the law has been made by Parker J. in the following words:⁴

‘In my opinion the general rule is that the court will not adjudicate on questions relating to the title to, or the right to possession of, immovable property out of the jurisdiction. There are, no doubt, exceptions to the rule, but, without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend upon the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of the Court of Equity in this country, would be unconscionable, and do not depend for their existence on the law of the *locus* of the immovable property.’

¹ *Portarlington v. Soulby* (1834), 3 My. & K. 104, 108–9, *per* Lord Brougham.

² *Ellerman Lines Ltd. v. Read*, [1928] 2 K.B. 144.

³ ‘Obligations arising from, or as from, a person’s own contracts and torts’ (Westlake, s. 172); ‘upon the ground of a contract or other equity subsisting between the parties respecting property situated out of the jurisdiction’ (Foote, p. 224); ‘either a contract between the parties to the action or an equity between such parties’ (Dicey, p. 145); ‘contract, fraud and trust’ (Wright J., *British South Africa Co. v. Companhia de Moçambique*, [1892] 2 Q.B. at p. 364).

⁴ *Deschamps v. Miller*, [1908] 1 Ch. 856 at p. 863.

It will lead, perhaps, to a better appreciation of the subject if we attempt to tabulate the various circumstances which have been considered sufficient to raise the necessary personal equity.

(i) *Contracts relating to foreign land.*

It is clear that a party to a contract concerning foreign land is subject to a personal obligation which affects his conscience and which can be enforced by the personal process of a court of equity.¹ The existence of a contractual obligation was the ground of the decision in *Penn v. Baltimore*.² In the very early case of *Archer v. Preston*³ the defendant, who refused to perform a contract for the sale of land in Ireland, was successfully sued for specific performance while on a casual visit to England. Again, in a modern case,⁴ a decree for specific performance was made against the English executors of a testator who had agreed for valuable consideration to execute a legal mortgage of land in the island of Dominica.

Contract imposes a personal obligation upon the parties

(ii) *Fraud and other unconscionable conduct.*

The objection was raised as long ago as 1682, in the case of *Arglasse v. Muschamp*,⁵ that the English court has no jurisdiction to hear a suit founded on fraud if the fraud is concerned solely with foreign land. In overruling the objection the Chancellor stigmatized it as 'only a jest put upon the jurisdiction of this court by the common lawyers'. Fraud is an extrinsic, collateral act, violating all proceedings, even those of courts of justice,⁶ and it always creates a right in the injured party to sue the defendant *in personam* wherever he can find him, no matter where the cause of action has arisen or where the subject-matter of the action is situated. The leading case is *Cranston v. Johnston*.⁷

Fraud imposes personal obligation on guilty party

The plaintiff was liable under an arbitrator's award to pay to the defendant at Lloyd's Coffee House in London the sum of £2,521. 10s. 9d. but owing to absence abroad he was unable to make the payment at the

¹ *British South Africa Co. v. De Beers Consolidated Mines Ltd.*, [1910] 2 Ch. 502, at pp. 523-4, *per* Kennedy L. J.; *St. Pierre v. South American Stores*, [1936] 1 K.B. 382; *Cood v. Cood* (1863), 33 L.J. Ch. 273.

² *Supra*, p. 583.

³ Undated but cited in *Arglasse v. Muschamp* (1682), 1 Vern. 75, 77.

⁴ *In re Smith, Lawrence v. Kitson*, [1916] 2 Ch. 206; *supra*, p. 566.

⁵ (1682), 1 Vern. 75.

⁶ *Duchess of Kingston's Case* (1776), Harg. State Trials, 602, *per* De Grey L.C.J.; *White v. Hall* (1806), 12 Ves. 321.

⁷ (1796), 3 Ves. Jr. 170.

- ✓ required time. He was entitled to a plantation of great value in the island of St. Christopher. The law of that island allowed a creditor to proceed against an absent debtor after leaving a summons at the freehold of the debtor and nailing another on the court-house door. The defendant availed himself of this procedure, and after judgment had been obtained without any actual notice to the plaintiff, the plantation was seized by the Provost-Marshal and the plaintiff's interest therein sold to the defendant for £2,000, which was far less than its true value. The plaintiff filed a bill for relief in the English Court of Equity.

The Master of the Rolls decreed that upon receipt of what was due for principal, interest and costs the defendant should reconvey the plantation to the plaintiff. He did not deny that what had been done was in accordance with the *lex situs*, but he pointed out that the defendant had used the local law not to satisfy the debt, but to obtain an estate at an inadequate price. This was a 'gross injustice' sufficient to justify the court in acting upon the conscience of the defendant.

✓ (iii) *Fiduciary relationship*.

Trust A trust attached to foreign land may be enforced by the English court, provided that the trustee is present in this country.¹ This is so, even though the author of the trust is domiciled abroad.²

Mortgage Again, a personal equity arising from a mortgage of foreign land may justify an action in this country. Thus, where the mortgagor of land in Jamaica had obtained a decree from the English court which directed certain accounts to be taken with a view to redemption, the court granted an injunction restraining the mortgagees, who were present in England, from instituting foreclosure proceedings in Jamaica.³ The mortgagor had a clear equity to be protected from a double account. The same principle applies to foreclosure proceedings. In English proceedings a decree in a foreclosure suit is merely a decree *in personam* since it destroys the right of redemption given by equity to the mortgagor, and it can therefore be made by an English court against a mortgagor who is within the jurisdiction, although the subject of the mortgage may be immovables situated abroad.⁴

¹ *Kildare v. Eustace* (1686), 2 Cas. in Ch. 188.

² *Ewing v. Orr-Ewing* (1883), L.R. 9 A.C. 34.

✓ ³ *Beckford v. Kemble* (1822), 1 Sim. & St. 7.

⁴ *Toller v. Carteret* (1705), 2 Vern. 494; *Page v. Ede*, [1874] L.R. 18 Eq. 118.

Whether a personal obligation is such as to affect the defendant's conscience is a matter to be determined solely by English law. The court does not refuse to exercise its equitable jurisdiction merely because the right, recognized by English law as springing from the personal relationship between the parties, is one which is not recognized by the *lex situs*. Lord Cottenham, in the case of *Ex parte Pollard*,¹ said:

Equitable right enforced though not recognized by *lex situs*

'The courts of this country in the exercise of their jurisdiction over contracts made here or in administering equities between parties here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situated, or of the manner in which the courts of such countries might deal with such equities.'

In that case, an equitable mortgage according to English law had been created over Scottish land by the deposit of title-deeds, together with a memorandum by which the mortgagors agreed to do anything necessary to make the security more effective. The mortgagors, who were partners carrying on business in Scotland and England, became bankrupt, and the mortgagee claimed in the English court to have his debt paid out of the Scottish land in preference to the general body of creditors. The objection raised to this claim was that by the law of Scotland no lien or equitable mortgage on the land was created by the deposit of the title-deeds or by the written memorandum. The court decided in favour of the plaintiff. There was nothing in Scottish law which made it illegal or impossible for the mortgagors to create an effective mortgage according to the terms of their contract, and the fact that what they had done did not create a right *in rem* according to the *lex situs* was no reason why the English court should not enforce the personal obligation by decreeing the execution of an instrument in the proper Scottish form.

The doctrine of *Penn v. Baltimore*, however, is subject to two limitations.

Performance of English decree must be possible in the *situs*

First, it must be possible for the decree issued by the English court to be carried into effect in the country where the land is situated.²

This restriction requires no elaboration, for the futility of ordering the defendant to perform some act which would be forbidden by the *lex situs* is obvious. As Lord Cottenham said

¹ (1840), Mont. & Ch. 239; *In re Anchor Line*, [1937] 1 Ch. 483, 488.

² *Waterhouse v. Stansfield* (1851), 9 Hare 234.

in *Ex parte Pollard*:¹ 'If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act.'

Must be
privity of
obligation
between
the parties

Secondly, the personal obligation which is the basis of the English court's jurisdiction must, to use an expression of Beale, 'have run from the plaintiff to the defendant',² i.e. there must be privity of obligation between the parties to the action.

It is firmly established that the court acts only against the actual person who, as a result of his *own* conduct, is under a personal obligation to the plaintiff, and it stops short of exercising the jurisdiction against a third party, even though he may have acquired the land from one who is contractually, or otherwise personally, liable to the plaintiff.³ There must be privity of obligation between plaintiff and defendant, and that privity must arise from some transaction effected by the plaintiff with the defendant. If *A* agrees to sell foreign land to *B*, there is no doubt that *A* incurs a personal liability which is justiciable in England. But if, in breach of his contract, *A* sells the land to *X*, there is no personal equity which *B* can enforce against *X*. There is no contract by *X* with *B*, no unconscionable conduct by *X* towards *B* personally. What is involved in such a case is a claim of title to foreign land advanced by two contesting parties who are strangers to each other so far as mutual dealings are concerned. Such a question of title is, of course, determinable exclusively by the *lex situs* and is subject exclusively to the jurisdiction of the courts at the *situs*. 'I need not dwell', said Kay J. in a leading case, 'upon the danger of error if the courts of this country were to entertain jurisdiction to determine a contested claim of this kind depending upon questions of foreign law'.⁴

Norris v.
Chambres

An apt illustration is *Norris v. Chambres*.⁵ In that case Sadleir agreed to buy certain Prussian lands from Simons and paid a deposit. Simons refused to complete and sold the land to Chambres, who had notice of Sadleir's contract. Sadleir's

¹ (1840), Mont. & Ch. 239.

² 20 H.L.R. 390.

³ *Martin v. Martin* (1831), 2 R. & M. 507; *Waterhouse v. Stansfield* (1851), 9 Hare. 234; *Norris v. Chambres* (1861), 29 Beav. 246; affirmed (1861), 3 De G. F. & J. 583; *Hicks v. Powell* (1869), L.R. 4 Ch. 741; *Norton v. Florence Land Co.* (1877), 7 Ch.D. 332.

⁴ *In re Hawshorne* (1883), 23 Ch.D. 743, 747.

⁵ (1861), 29 Beav. 246; (1861); 3 De G.F. & J. 583.

representative brought a suit in England claiming that he was entitled to a lien on the land. Sir John Romilly M.R., in dismissing this claim, referred to the cases which had followed *Penn v. Baltimore*, and said:¹

'On examining them, I find that in all of them a privity existed between the plaintiff and defendant; they had entered into some contract, or some personal obligation had been incurred moving directly from the one to the other. In this case I cannot find that anything of that sort exists.'

Later he said:

'Simons having received this money repudiates the contract, and sells the estate to a stranger. That constitutes no personal demand which Sadleir could enforce in this country against that stranger. There is no contract between them, there are no mutual rights, and there is no obligation moving directly from one to the other. I am told that . . . according to the law of England, if a man sell an estate to *B*, and receive part of the purchase money, and then repudiate the contract and sell the estate to *C*, who has notice of the first contract and of the payment of part of the purchase money by *B*, *B* shall, in that case, have a lien on the estate in the hands of *C* for the money paid to the original owner. But assume this to be so, this is purely a *lex loci* which attaches to persons resident here and dealing with land in England. If this be not the law of Prussia, I cannot make it so because two out of the three parties dealing with the estate are Englishmen, and I have no evidence before me that this is the Prussian law on the subject, and if it be so, the Prussian courts of justice are the proper tribunals to enforce these rights.'

This decision was followed in *Deschamps v. Miller*,² where the facts were these:

H and *W* married each other in France where they were domiciled. *H* later settled in India and, having gone through a ceremony of marriage with *X* during the lifetime of *W*, made a settlement, of which the defendants were trustees, of land in Madras in favour of *X*, and certain other persons. After the death of *H* and *W*, the plaintiff, who was their only son and the administrator of *W*'s English property, sued the defendants to impeach the settlement, his contention being that by French law *W* became entitled to one-half of the after-acquired property of *H* and to a life interest in the other half.

The plaintiff failed in his action, since there was no possible ground upon which a personal remedy against the defendants could be based. The issue was whether Indian law admitted

¹ 29 Beav. at pp. 254-5.

² [1908] 1 Ch. 856; Morris, *Cases on Private International Law*, p. 244.

that the wife acquired an interest in the land by virtue of her marriage in France and, if so, whether she could have followed the land into the hands of the defendants. These were matters that fell within the exclusive jurisdiction of the Indian tribunals.

✓ Third parties affected if subject to personal obligation There may, of course, be exceptional circumstances in which an equity which has arisen between *A* and *B* can be enforced against *C* under the doctrine of *Penn v. Baltimore*. It is always a question of personal obligation. Is the defendant, though not a party to the original transaction which gave rise to the dispute, contractually or otherwise personally bound? Thus in *Mercantile Investment and General Trust Company v. River Plate Trust, Loan and Agency Co.*¹

An American company created an equitable charge over land in Mexico in favour of certain English debenture-holders. The charge was void by Mexican law for want of registration. The land was later transferred to the defendants, an English company, but 'subject to the mortgage, lien or charge now existing' in favour of the debenture-holders.

To an action brought in England to enforce this equitable charge it was objected that there was no privity of obligation between the debenture-holders of the American company and the defendants. The defendants had not issued the debentures, and, by Mexican law, they were the absolute and unfettered owners of the land. North J. had no difficulty in disposing of this argument. The defendants had agreed to take the land subject to an express obligation in favour of the debenture-holders, and it was clearly unconscionable that they should rely exclusively upon the *lex situs*.

Dangers inherent in *Penn v. Baltimore* Such, then, is the doctrine that the English court invokes to justify an order which, though personal in form, may affect the title to foreign land. It is a doctrine that in some cases has undoubtedly been carried to an extent scarcely warranted by the principles of international law,² as, for instance, where an Englishman resident in Chile was ordered to carry out a contract concerning land, binding according to English law, which the Chilean courts had held not to be binding.³ There is, indeed, an obvious danger of injustice if, to take one example, the strict rules which English law applies to dealings with trust property are applied to a dispute between foreigners who, according to the *lex situs*, are not exactly related to each other

¹ [1892] 2 Ch. 303.

² Story, op. cit. (8th ed.), p. 758.

³ *Good v. Good* (1863), 33 Beav. 314.

as trustee and beneficiary.¹ In fact, Lord Esher once went so far as to say that the decision in *Penn v. Baltimore*, 'which has been acted upon by other great judges in equity, seems to me to be open to the strong objection that the court is doing indirectly what it dare not do directly'.²

An interesting question which has never arisen in England is whether a foreign judgment based upon the same principle as that adopted in *Penn v. Baltimore*, but affecting *English* land, will be granted extra-territorial effect. If, for instance, a Californian court decrees that *X*, resident in California, shall reconvey English land to *Y*, from whom he has obtained it by fraud, will the English court, at the suit of *Y*, compel *X* to carry the decree into effect? Comity, if it means anything, would dictate an affirmative answer. It is arguable that if it is right for an English court to order a person within the jurisdiction to effect a certain disposition of land abroad, it is wrong to deny an equivalent power to a foreign court. Moreover, as such cases as *Travers v. Holley*³ show, this spirit of reciprocity is not lacking in other contexts and few would disagree in general with the observation of Hodson L.J. in that case that:

The converse of
Penn v.
Baltimore

'It must surely be that what entitles an English court to assume jurisdiction must be equally effective in the case of a foreign court.'⁴

However, any attempt by a foreign court to regulate the disposition of land outside its jurisdiction not unnaturally provokes a certain animosity in the *forum rei sitae* and it is doubtful whether in this particular context the English judges would be imbued with any spirit of reciprocity. The Supreme Court of Canada, indeed, has satisfied itself that English courts do not regard their own decrees *in personam* affecting land abroad as having any extra-territorial effect, and that therefore no recognition will be granted to similar decrees of foreign courts.⁵

¹ See the remarks of Lord Macnaghten in *Concha v. Concha*, [1892] A.C. 670, 675. See also Baty, *Polarized Law*, pp. 86-87.

² *Companhia de Moçambique v. British South Africa Co.*, [1892] 2 Q.B. 358, 404-5.

³ [1953] P. 246; *supra*, p. 377.

⁴ *Ibid.*, at p. 256.

⁵ *Duke v. Adler*, [1932] S.C.R. 734; and see an article by D. M. Gordon, 49 L.Q.R. 547, on this case where he also cites two decisions in the U.S.A. to the same effect.

PART VI
FOREIGN JUDGMENTS

CHAPTER XVII

FOREIGN JUDGMENTS

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I. PRINCIPLE OF RECOGNITION

UNSATISFIED foreign judgments give rise to complicated questions of private international law. If a plaintiff fails to obtain satisfaction of a judgment in the country where it has been granted, the question arises whether it is enforceable in another country where the defendant is found. It is clear at the outset that owing to the principle of territorial sovereignty a judgment delivered in one country cannot, in the absence of international agreement, have a direct operation of its own force in another. Levy of execution, for instance, cannot issue in England in respect of a judgment delivered in France. Nevertheless, the Anglo-Saxon systems of law have long permitted the enforcement of a foreign judgment within certain defined limits, since otherwise one of the essential objects of private international law, the protection of rights

Foreign judgments have no direct effect in England

acquired under a foreign system of law, would not be fully attained.¹

Foreign judgment creates a cause of action in England
The recognition formerly based on theory of comity

The attitude adopted by English law from the earliest days has been to permit the successful suitor to bring an action in England on the foreign judgment. But in the last hundred years the courts have changed their view as to the ground upon which this privilege is based. The older cases put it solely upon the ground of comity.² This vague principle would appear to mean that, in order to obtain reciprocal treatment from the courts of other countries, we are compelled to take foreign judgments as they stand and to give them full faith and credit. Thus in 1798 Ashhurst J., speaking of certain judgments given by the French courts, used the following language:

‘Those courts had competent jurisdiction over the subject-matter; and it is an established rule that the judgment of a foreign court . . . is conclusive if the same question arise again here. Now as the French courts have already given a judicial opinion upon this question, it must govern us whatever may be our opinions concerning the real merits of the case.’³

In other words, a foreign judgment must as a general rule be taken at its face value.

¹ Bar. 895. As we shall see, English law permits an action to be brought, subject to certain conditions, for the recovery of a sum of money adjudged to be due by a foreign court of competent jurisdiction. This is very different from the practice obtaining on the Continent. In France, for instance, the position has been described as follows by a learned writer: ‘In France, when proceedings are brought for the enforcement of a foreign judgment, the French courts first satisfy themselves that the foreign judgment fulfils certain conditions (conditions which, though not the same, are fairly similar to those required by an English court when an action on the judgment is brought). If the foreign judgment is found to satisfy these conditions, then an *exequatur* is granted, if there is a convention to this effect with the country from which the judgment issues. In the absence of such convention, however (except in judgments relating to matters of personal status), the French courts have the right, which they apparently almost invariably exercise, of revision, which means that the case is re-opened on its merits and the proceedings are, so far as delay and expense are concerned, equivalent to a retrial of the case *de novo*. The foreign judgment is not regarded as final, but merely as a *titre* or instrument on the basis of which certain conservatory measures can be taken (viz. the preservation of assets in the hands of the judgment debtor)’, 10 *B.Y.B.I.L.* (1929), 225. No conventions have been made by England. Hence the, importance of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, *infra*, pp. 603–6, under which, it is to be hoped, mutual arrangements with foreign countries for the enforcement of judgments will be made. As to the *exequatur* provisions in the new draft code of French law see 29 *Canadian Bar Review*, 744–6.

² See Piggott, *Foreign Judgments*, part i, pp. 10 et seqq.

³ *Geyer v. Aguilar* (1798), 7 T.R. 681, 697.

To base enforcement upon this uncertain ground quickly leads to difficulties. One result is that the question of reciprocity becomes relevant, for enforcement must be withheld if the judgment emanates from a country which refuses to grant a similar measure of credit to the judgments of English courts.¹ Thus in the leading American case of *Hilton v. Guyot*,² the Supreme Court held that conclusive effect could not be given to the judgments of French courts, since French law refused to recognize the authority of foreign judgments. Another objection to the theory of comity is the impossibility of determining with precision the defences available to the defendant.³ If the English court is *compelled* by comity to enforce the judgment, logic would seem to exclude all defences, except the want of jurisdiction in the foreign court; but to carry enforcement to these lengths is obviously inconsistent with the most elementary notion of natural justice.

Inadequacy
of the
principle
of comity

It is unnecessary, however, to consider the theory of comity further, for it has been supplanted by a far more defensible principle which has been called 'the doctrine of obligation'.⁴ This doctrine, which was laid down in 1842, is that where a foreign court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, the liability to pay that sum becomes a legal obligation which may be enforced in this country by action.⁵ Once the judgment is proved the burden lies upon the defendant to show why he should not perform the obligation.

The
modern
doctrine of
obligation

'The judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which the courts in this country are bound to enforce.'⁶

In other words, a new right has been vested in the creditor and a new obligation imposed upon the debtor at the instance of the foreign court.⁷ Lord Esher once said that 'the liability of the defendant arises upon an implied contract to pay the amount of

¹ See *per* Blackburn J. in *Schibsby v. Westernholz* (1870), L.R. 6 Q.B. 155, 159.

² 159 U.S. 113; Lorenzen, p. 180; Beale, ii. 631.

³ Piggott, *Foreign Judgments*, part i, p. 11.

⁴ *Ibid.*, pp. 10 et seqq.

⁵ *Russell v. Smyth* (1842), 9 M. & W. 810, at p. 819, *per* Parke B.; *Williams v. Jones* (1845), 13 M. & W. 628; *Godard v. Gray* (1870), L.R. 6 Q.B. 139, at p. 148, *per* Blackburn J.

⁶ *Schibsby v. Westernholz* (1870), L.R. 6 Q.B. 155, 159, *per* Blackburn J.

⁷ *Grant v. Easton* (1883), L.R. 13 Q.B.D. 302, 303.

the foreign judgment'.¹ This does not mean that the justification for the enforcement of the obligation is an implied contract, but that for procedural purposes the debtor is regarded as having implicitly promised to pay.² Historically this is well founded, for according to the doctrine of *Slade's Case* the mere existence of the debt raises an implied promise to pay the amount due. The creditor sues for the recovery of a simple contract debt, and since this is a liquidated amount he may proceed by way of a specially endorsed writ.³

Merits of the doctrine of obligation
The merits of this doctrine, as compared with the principle of comity, are twofold. In the first place the question of reciprocity is eliminated. If *A* is under a legal obligation to *B*, there is no more need to consider what treatment is meted out by the foreign courts in question to English judgments than there would be to examine the private international law, say, of France, where the obligation resulted from a contract made in France. An obligation, once recognized by English law, must be enforced irrespectively of the substantive rules of law obtaining in the country of its creation. In the second place, there is little difficulty in prescribing the defences available to the defendant, for if the ground of his liability is an obligation, then any fact which disproves the existence of an obligation may be pleaded in bar.

No merger of cause of action in foreign judgment
It is a rule of domestic English law that a plaintiff who has obtained judgment in England against a defendant is barred from suing again on the original cause of action. The original cause of action is merged in the judgment—*transit in rem judicatam*—and it would be vexatious to subject the defendant to another action for the purpose of obtaining the same result.⁴ It has been held, however, in a series of authorities, that this is not so in the case of foreign judgments.⁵ Such a judgment does not, in the view of English law, occasion a merger of the original cause of action, and therefore the plaintiff has his option, either to resort to the original ground of action or to sue on the judgment recovered,⁶ provided, of course, that the judg-

¹ For the basis upon which foreign judgments are recognized in England see Read, *Recognition and Enforcement of Foreign Judgments*, pp. 52 et seqq.

² Read, op. cit., pp. 112-13.

³ *Grant v. Easton* (1883), 13 Q.B.D. 302; i.e. under O. 3 R. 6. of the R.S.C.

⁴ *King v. Hoare* (1844), 13 M. & W. 494, 504.

⁵ *Hall v. Odber* (1809), 11 East 118; *Smith v. Nicolls* (1839), 5 Bing. (N.C.) 208; *Bank of Australasia v. Harding* (1850), 9 C.B. 661; *Bank of Australasia v. Nias* (1851), 16 Q.B. 717.

⁶ *Per Tindal C.J., Smith v. Nicolls, supra*, at p. 221.

ment has not been satisfied.¹ It is reasonably clear that there is no justification for thus differentiating between English and foreign judgments.² The reasons upon which the doctrine is founded are obscure and evasive, and the principal consideration that would appear to have influenced the courts, namely, that a foreign judgment is only evidence of the debt due from the defendant,³ was forcibly demolished by the majority of the court in the later case of *Godard v. Gray*.⁴ The most plausible justification for non-merger, perhaps, is that a plaintiff suing in England on a foreign judgment, as contrasted with one who sues on an English judgment, possesses no higher remedy than he possessed before the foreign action. The effect of judgment in English proceedings is that 'the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher';⁵ but the view which English law takes of a foreign judgment is that it creates merely a simple contract debt between the parties. The doctrine of non-merger has, however, been too often repeated by judges to justify any prospect of its abandonment.

A foreign arbitral award is on the same footing as a foreign judgment in the sense that an action to recover the sum awarded may be brought in England. The essentials of success are proof that the parties submitted to arbitration, that the arbitration was conducted in accordance with the submission, and that the award is valid by the law of the country in which it has been made.⁶

Foreign
arbitral
awards

II. DIRECT ENFORCEMENT OF FOREIGN JUDGMENTS IN ENGLAND

The common law doctrine that a foreign judgment, though creating an obligation that is actionable in England, cannot be enforced here except by the institution of fresh legal proceedings, is subject to important statutory exceptions introduced by the Judgments Extension Act, 1868; the Administration of Justice Act, 1920, Part II; and the Foreign Judgments

Exceptions
to rule that
foreign
judgment
not directly
enforceable
in England

¹ *Barber v. Lamb* (1860), 8 C.B. (N.S.) 95.

² See Piggott, *Foreign Judgments*, part i, p. 15; Read, *Recognition and Enforcement of Foreign Judgments*, pp. 116-21.

³ See, for example, *Hall v. Odber*, *supra*, per Bayley J.

⁴ (1870), L.R. 6 Q.B. 139, 149-50.

⁵ *King v. Hoare* (1844), 13 M. & W. 494, 504, per Parke B.

⁶ *Norske Atlas Insurance Co. Ltd. v. London General Insurance Co. Ltd.* (1927), 43 T.L.R. 541. This right of action is not affected by the statutory right to enforce certain foreign arbitral awards; Arbitration Act, 1950, s. 40 (a); *infra*, pp. 606-8.

(Reciprocal Enforcement) Act, 1933.¹ We will deal with these statutes separately.

I. JUDGMENTS EXTENSION ACT, 1868

Exceptional position of Scottish and Irish judgments Scotland and Ireland, from the point of view of private international law, are foreign countries, and before 1868 a plaintiff who had obtained judgment in either of these countries and who desired to enforce it against the defendant in England was in no better position than if he had obtained his judgment in some country which did not form part of the United Kingdom. His only course was to bring a fresh action in England. The Act of 1868 was therefore passed with the object of rendering judgments obtained in the Superior Courts of England, Scotland and Ireland, respectively, effectual in any other part of the United Kingdom.

Irish or Scottish judgment has full effect in England The Act now applies only to judgments obtained in the English High Court of Justice, the High Court of Justice in Northern Ireland² and the Court of Session in Scotland. Each of these courts keeps a register, in which a certificate affirming that a judgment has been obtained in either of the other two countries may be entered. A judgment is 'extended' by registering in the country where enforcement is desired a certificate issued by the adjudicating court. The Act provides that:

'[The certificate] shall from the date of such registration be of the same force and effect, and all proceedings shall and may be had and taken on such certificate, as if the judgment of which it is a certificate had been a judgment originally obtained . . . in the court in which it is so registered, and all the reasonable costs and charges attendant upon the obtaining and registering such certificate shall be recovered in like manner as if the same were part of the original judgment.'³

There are, however, two limitations to be noticed.

Only money decrees extendible First, the only type of judgment of which a certificate may be registered is one for 'any debt, damages or costs'.⁴ The judgment which it is sought to extend must be one which decrees

¹ See an article by Professor H. E. Yntema, 33 *Michigan Law Review* (June 1935), pp. 1129 et seqq.

² After Eire became a Dominion it was held that judgments by its courts could no longer be registered in England under the Act of 1868; *Wakely v. Triumph Cycle Co.*, [1924] 1 K.B. 214; *Banfield v. Chester* (1925), 94 L.J., K.B. 805; but for the contrary view taken in Eire see *Gieves Ltd. v. O'Connor*, [1924] 2 Ir.R. 182. Eire is now a Republic.

³ S. 1. Unless the registration is effected within twelve months after the judgment, leave must be obtained from the court in which registration is sought.

⁴ S. 1.

the payment of a sum of money. Thus judgments in probate and divorce suits or for the recovery of land, and decrees of courts of Equity, are outside the statutory provisions.¹

Secondly, although in general a judgment extended from Scotland or Northern Ireland has the same effect in England as if it had originally been given by an English court, yet the control of the court is limited to execution.² Execution means the enforcement of a judgment, and it has therefore been held that the English court cannot issue a judgment summons³ or a bankruptcy notice⁴ upon an extended judgment. If, for instance, a Scottish judgment creditor desires to take bankruptcy proceedings against the debtor, he must first sue him in England upon the judgment.⁵

Juris-
diction is
limited to
execution

An Irish or a Scottish judgment which has been extended to England cannot be impeached upon its merits in an English court. The sole course open to a defendant who desires to challenge the validity of the original judgment is to take the appropriate proceedings in the country where the judgment was given.⁶

Original
judgment
not im-
peachable
in England

The statute is confined to the superior courts of the three countries, but the Inferior Courts Judgments Extension Act, 1882,⁷ has made the same procedure applicable to the judgments of inferior courts, such as the County Court in England or the Sheriff's Court in Scotland.

Judgments
of inferior
courts
extendible

Other statutes provided for the reciprocal enforcement of orders made in bankruptcy⁸ and in the course of winding up a company.⁹

Bankruptcy
and
winding-
up orders

2. ADMINISTRATION OF JUSTICE ACT, 1920¹⁰

This Act, which was passed upon the recommendation of the Imperial Conference of 1911, makes provision for the enforcement within the United Kingdom of judgments obtained in a superior court of any part of the British dominions, including any territory which is under Her Majesty's protection or mandate.¹¹

¹ *Wotherspoon v. Connolly* (1871), 9 Macph. (Ct. of Sess.) 510, 513, *per* Lord President Inglis.

² S. 4.

³ *In re Watson*, [1893] 1 Q.B. 21.

⁴ *In re a Bankruptcy Notice*, [1898] 1 Q.B. 383.

⁵ *In re a Judgment Debtor*, [1939] Ch. 601, 605.

⁶ See *Bailey v. Welpley* (1869), Ir.R. 4 C.L. 243.

⁷ 45 & 46 Vict., c. 31.

⁸ Bankruptcy Act, 1914, s. 121.

⁹ Companies Act, 1949, s. 276.

¹⁰ 10 & 11 Geo. V, c. 81.

¹¹ S. 13.

Registration of Common-wealth judgments in England A person who has obtained a judgment in one of these countries or territories may within twelve months apply for registration to the High Court in England or Ireland or to the Court of Session in Scotland, whereupon the court may, *if in all the circumstances of the case they think it is just and convenient that the judgment should be enforced in the United Kingdom*, order the judgment to be registered.¹ Thus, registration is not a right, as it is under the Judgments Extension Act, 1868, but lies wholly within the discretion of the court.

When registration not allowed A judgment cannot be registered unless it is one under which a sum of money is made payable.² Nor is registration allowed if:

- (a) the original court acted without jurisdiction;
- (b) the judgment debtor did not voluntarily submit to the jurisdiction of the adjudicating court, unless he was carrying on business or was ordinarily resident within that jurisdiction;
- (c) the judgment debtor was not served and did not appear in the original proceedings;
- (d) the judgment was obtained by fraud;
- (e) an appeal is pending;
- (f) the original cause of action was one which, for reasons of public policy or for some other similar reason, could not have been entertained in England.³

Effect of registration A judgment registered under the Act is of the same force and effect, and it may be followed by the same proceedings, as if it had originally been obtained in the registering court.⁴ That court possesses the same control and jurisdiction over the judgment as it possesses over similar judgments given by itself, but in so far only as relates to execution.⁵ A plaintiff is in no way deprived of his right to sue at common law upon the obligation created by a foreign judgment,⁶ but if he sues on a judgment that is registrable under the Act he is not entitled to the costs of the action unless registration has been refused or unless the court otherwise orders.⁷

Reciprocal arrangements must be made for registration of English judgments The Act, however, does not render a judgment registrable within the United Kingdom unless its provisions have been extended by Order in Council to the country in which the judgment has been obtained. Reciprocity is essential. When reciprocal provisions have been made by a colony for the

¹ S. 9 (1).

² S. 12.

³ S. 9 (2).

⁴ S. 9 (3) (a).

⁵ S. 9 (3) (d).

⁶ *Yukon Consolidated Gold Corporation v. Clark*, [1938] 2 K.B. 241, 252.

⁷ S. 9 (5).

enforcement of English, Scottish and Irish judgments, an Order in Council may be made extending the Act to the colony in question.¹ The Act has already been extended to a large number of Dominions, colonies and mandated territories, including Jamaica, Kenya, the Federated Malay States, New Zealand, New South Wales, Queensland, South Australia, Western Australia, Victoria and Tasmania.²

3. FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT, 1933³

The policy of facilitating the direct enforcement of foreign judgments in England has received a further impulse from the Foreign Judgments (Reciprocal Enforcement) Act, 1933, which applies the principle of registration, not only to Her Majesty's dominions, but also to foreign countries. In the words of Greer L.J.:

Judgments
in countries
outside
British
Empire
registrable,
subject to
reciprocal
treatment

'It was fully appreciated by those who thought about foreign judgments, that British judgments were never enforced as of right in foreign countries, and that was believed, and rightly believed, to operate as an injustice to this country. Whereas we enforced foreign judgments by means of action in this country, foreign countries refused to enforce the judgments obtained in this country, and it was to deal with that situation that the Act of 1933 was passed, but incidentally it also dealt with Dominion judgments.'⁴

The provisions made by the Act for the registration of foreign judgments in England may be extended by Order in Council to any country which is prepared to afford substantial reciprocity of treatment to judgments obtained in the United Kingdom.⁵ It is undesirable that there should be two systems of registration, one for the British Commonwealth, the other for countries outside the Commonwealth, and therefore a policy of the gradual supersession of the 1920 Act has been adopted. With this object in view power is given to render the 1933 Act applicable by Order in Council to British dominions, protectorates and mandated territories, and it is provided that the Administration of Justice Act, 1920, shall cease to apply to any part of Her Majesty's dominions in relation to which such an

¹ S. 14.

² For a complete list see the Statutory Rules and Orders from 1922 onwards.

³ 23 Geo. V, c. 13.

⁴ *Yukon Consolidated Gold Corporation v. Glark*, [1938] 2 K.B. 241, 253. See S.R. & O. (1933), No. 1073.

⁵ S. 7.

Order has been made.¹ An Order to this effect was made for India and Burma,² but the Burma Independence Act, 1947,³ provides that references to British Burma in previous Acts or Orders shall not be construed as references to the new 'independent country of Burma', and therefore the Order now applies only to India and Pakistan.⁴

French and
Belgian
judgments
now
registrable

Two conventions made in 1934 have extended the provisions of the Act to French and Belgian judgments.⁵ These provide that judgments of the superior courts in civil and commercial matters shall be mutually recognized and enforced, notwithstanding that the adjudicating court followed rules for the choice of law different from those that would have been followed in the country where enforcement is sought.

Pre-
requisites
of registra-
tion

The successful party to proceedings in a foreign country to which the Act has been extended may apply to the High Court at any time within six years⁶ for registration of the judgment in England, provided that the judgment was delivered by a superior court in the foreign country, and provided that it finally and conclusively adjudged a sum of money to be payable to the applicant, other than a sum in respect of taxes or in respect of a fine or other penalty.⁷ A judgment, however, is to be deemed final and conclusive, notwithstanding that an appeal may be pending against it or that it may still be subject to appeal in the foreign courts.⁸ The Act differs from the earlier Act of 1920 in that no discretion is left to the High Court. It is expressly provided that:

'On any such application the court shall, subject to proof of the prescribed matters and to the other provisions of this Act, order the judgment to be registered.'⁹

Setting
aside of
registration

There are, however, certain circumstances in which, on the application of the party against whom the registered judgment

¹ S. 7.

² S.R. & O. (1938), No. 1363.

³ S. 5 (4).

⁴ By the Indian Independence Act, 1947, s. 18, references in previous Acts and Orders to India are to be construed as references to India and Pakistan.

⁵ S.R. & O. (1936), No. 609 (France); No. 1169 (Belgium). For more details see 3 *I. & C.L.Q.R.*, pp. 90-92.

⁶ S. 2.

⁷ S. 1 (1), (2).

⁸ S. 1 (3). But it is provided by s. 5 (1) that on an application to set aside registration the court may do so or may adjourn the application if satisfied that an appeal is pending or that the defendant is entitled and intends to appeal; see, for an example where such an application was refused, *In re A Debtor* (No. 11 of 1939), [1939] 2 All E.R. 400. Under the Act of 1920 the fact that an appeal is pending is a bar to registration, *supra*, p. 602.

⁹ S. 2.

is enforceable, the registration *must* be set aside and other circumstances in which it *may* be set aside.

Registration *must* be set aside:

- (i) if the judgment is not one to which the Act applies;
- (ii) if the foreign court acted without jurisdiction;
- (iii) if the judgment debtor, being the defendant in the original proceedings, did not (despite service of process in accordance with the foreign law) receive notice of the proceedings in sufficient time to enable him to defend them and did not appear;
- (iv) if the judgment was obtained by fraud;¹
- (v) if the enforcement of the judgment would be contrary to public policy in England;
- (vi) if the rights under the judgment are not vested in the applicant.²

When
registration
must be set
aside

Registration *may* be set aside if the registering court is satisfied that the matter in dispute in the original proceedings had already been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.³

When
registration
may be set
aside

The rules by which the Act specifies the circumstances in which a foreign court shall be deemed to have had jurisdiction are worthy of close attention, for we shall see when we deal with the enforcement of foreign judgments by action that a certain element of doubt surrounds this question of jurisdiction. The rules vary according as the original action was *in personam* or *in rem*.

Cases in
which
foreign
court
deemed to
have juris-
diction

In the case of a judgment given in an action *in personam* the original court is deemed to have had jurisdiction in the following circumstances:

Jurisdic-
tion over
action *in*
personam

- (i) If the judgment debtor, being defendant in the original court, submitted to the jurisdiction by voluntarily appearing in the proceedings otherwise than for the purpose of contesting the jurisdiction or of protecting, or obtaining the release of, property seized, or threatened with seizure, in the proceedings.
- (ii) If the judgment debtor was plaintiff in the original action.
- (iii) If the judgment debtor, being defendant, had previously agreed to submit to the jurisdiction.
- (iv) If the judgment debtor, being defendant, was, at the time of the institution of the proceedings, resident in the foreign country, or, being a corporation, had its principal place of business in that country.

¹ When an application is made on this ground, the same rules apply as apply where the defence of fraud is raised to an action on a foreign judgment (*infra*, p. 636), *Syal v. Heyward*, [1948] 2 K.B. 443.

² S. 4 (1) (a).

³ S. 4 (1) (b).

- (v) If the judgment debtor, being defendant, had an office or place of business in the foreign country and the original action was brought in respect of a transaction effected through or at that office or place.¹

It is expressly enacted that the expression 'action *in personam*' shall not include any matrimonial cause, or any proceedings connected with matrimonial matters, the administration of the estates of deceased persons, bankruptcy, winding up of companies, lunacy or the guardianship of infants.²

Jurisdiction over action in rem The original court is deemed to have had jurisdiction over an action *in rem* if the subject-matter of the action, whether movable or immovable, was situated in the foreign country at the time of the proceedings.³

Effect of registration A judgment registered under the Act is, for the purposes of execution, of the same force and effect and subject to the same control as if it had originally been given in the registering court.⁴ Thus, in sharp contrast with the Acts of 1868 and 1920, a foreign judgment registered in England under the present Act may be used for the purpose of taking bankruptcy proceedings against the debtor.⁵

Judgment capable of registration unenforceable by action An innovation of outstanding importance is the enactment that:

'No proceedings for the payment of a sum payable under a foreign judgment, being a judgment to which this Part of this Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom.'⁶

This clearly means that no action can be brought on a judgment that is registrable, but does it also prevent the plaintiff from suing on the original cause of action? Since the section speaks only of the sum payable 'under a foreign judgment', it presumably does not affect the recovery of the sum payable under the original contract or other transaction. If this is the true position, it is unfortunate.⁷

4. ARBITRAL AWARDS

Arbitration Act, 1950 Provision is made for the enforcement of foreign arbitral awards by the Arbitration Act, 1950, which consolidates the Arbitration Acts, 1889 to 1934. The background of this provision is afforded by a protocol of 1923 and a convention of

¹ S. 4. (2) (a).

² S. 11 (2).

³ S. 4 (2) (b).

⁴ S. 2 (2).

⁶ S. 6.

⁵ *In re a Judgment Debtor*, [1939] Ch. 601.

⁷ See Dicey, p. 426.

1927 both of which were signed by Great Britain at Geneva. The former deals with the international validity of arbitration agreements, the latter with the enforcement in one country of arbitral awards made in another.

The protocol, which forms the First Schedule of the Act of 1950, provides that an agreement to submit contractual disputes to arbitration, made by parties who are subject to the jurisdiction of different signatory States, shall be recognized as valid in every signatory State, even though the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.¹ If one of the parties commences legal proceedings, instead of proceeding to arbitration, the court, on the application of the other party, must stay the proceedings, unless satisfied that the agreement for arbitration has become inoperative and cannot proceed or that there is not in fact any dispute falling within the scope of the arbitration agreement.²

In order to implement the convention of 1927, the Act next provides that a foreign award, as therein defined, shall be enforceable in England either by action or, with the leave of the High Court, in the same manner as a judgment is enforced.³ Further, the award is to be treated as binding for all purposes on the persons between whom it was made, who are to be entitled to rely upon it by way of defence, set-off or otherwise in any legal proceedings in England.⁴

A 'foreign award' means one which is

- (i) made in pursuance of an agreement for arbitration which is valid according to the law by which it is governed, *and*
- (ii) made between persons subject to the jurisdiction of signatory States to the 1927 Convention, *and*
- (iii) made in a territory to which the convention has been extended by Order in Council.⁵

An award, however, is not to be enforceable unless it satisfies certain conditions. It must have

- (a) been made in pursuance of an agreement for arbitration valid by the law by which it was governed;
- (b) been made by the tribunal provided for in the agreement;
- (c) been made in conformity with the procedural rules obtaining in the country where the arbitration was held;
- (d) become final in the country in which it was made;

¹ Arbitration Act, 1950, First Schedule, para. 1.

² Arbitration Act, 1950, s. 4 (2). ³ Ibid. s. 36 (1). ⁴ Ibid. s. 36 (2).

⁵ Ibid. s. 35. It has been extended to some fifty territories.

Geneva
protocol,
1923

Certain
foreign
awards
enforceable
in England

Conditions
of enforce-
ability

(e) been in respect of a matter which may lawfully be referred to arbitration under English law;

and its enforcement must not be contrary to the public policy or the law of England.¹

An award is not deemed final if proceedings for testing its validity are pending in the country in which it was made.² Moreover, an award is not to be enforceable if it does not deal with all the questions referred to the arbitration or exceeds the scope of the arbitration agreement, or if the party against whom enforcement is sought was not given sufficient notice of the arbitration proceedings or was under some legal incapacity and was not properly represented.³

III. ACTIONABILITY OF FOREIGN JUDGMENTS

We must now leave the exceptional cases in which statutes have enabled foreign judgments to be made directly effective in England, and must consider the principles upon which the successful litigant may take advantage of a foreign judgment to which no statute is applicable. A foreign judgment creditor has an alternative. He may either sue upon the obligation created by the judgment, or he may plead the judgment as *res judicata* in any proceedings which raise the same issue. It is to this extent that a foreign judgment may be described as effective in England. We must first consider the general requirements upon which this effectiveness depends.

I. PREREQUISITES OF ACTIONABILITY

A. Competence of the foreign court⁴

Foreign court must have had jurisdiction over the defendant

The first and overriding essential for the effectiveness of a foreign judgment in England is that the adjudicating court should have had jurisdiction in the international sense over the defendant. A foreign court may give a judgment which, according to the system of law under which it sits, is conclusively binding upon the defendant, but unless the circumstances are such as in the eyes of English law justify the court in having assumed such jurisdiction, the judgment does not create a cause of action that is actionable in England. In *Sirdar Gurdial Singh v. The Rajah of Faridkote*,⁵ for instance:

The Rajah obtained two *ex parte* judgments in two actions brought

¹ Arbitration Act, 1950, s. 37 (1).

² Ibid. s. 39.

³ Ibid. s. 37 (2).

⁴ See 2 *I. & C.L.Q.R.*, pp. 510 et seqq.

⁵ [1894] A.C. 670.

by him against the appellant for sums amounting to over 76,000 rupees. The appellant, who had been treasurer to the Rajah, left Faridkote five years before these actions and did not return there again. An action founded on the judgments was later brought against the appellant in the court at Lahore, where he was then resident. This action was therefore on a foreign judgment, since Faridkote was a native State with independent jurisdiction.

It was held by the Privy Council that the action brought at Lahore must fail, for the Faridkote court had no jurisdiction on any recognized principle of international law against a man who had left the territory and who was the domiciled subject of another State.

The requirement is that the foreign court should have been a court of competent jurisdiction in the international sense, i.e. according to the principles of private international law as understood in England. In other words, the inquiry with which we are now concerned is whether, in the view of English law, the foreign court was entitled to summon the defendant and subject him to judgment.¹ We must now deal separately with actions *in personam* and actions *in rem*.

Jurisdiction in the international sense

(a) *Jurisdiction over actions in personam.*

Since a foreign judgment is actionable only because it imposes an obligation upon the defendant, it follows that any fact which negatives the existence of that obligation is a bar to the action. One of the negating facts must necessarily be that the defendant owes no duty to obey the command of the tribunal which has purported to create the obligation. There must be a correlation between the legal obligation of the defendant and the right of the tribunal to issue its command. The circumstances in which an English court may assume power to determine a claim *in personam* are well settled, and it is legitimate to infer that the criterion by which the competence of an English court is tested must also be adopted when the inquiry relates to the competence of a foreign court. Personal jurisdiction in this country depends upon the right of a court to summon the defendant. Apart from special powers conferred by statute² it is obvious that, since the right to summon depends upon the power to summon, jurisdiction is in general exercisable only against those persons who are present in England.³

Suggested that it is presence or submission

¹ *Pemberton v. Hughes*, [1899] 1 Ch. 781, 790 et seqq.; *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641, 659. ² *Supra*, pp. 113 et seqq.

³ *Employers' Liability Assurance Corporation v. Sedgwick Collins & Co.*, [1927] A.C. 95, 114.

If the defendant is absent from a country and has no place of business there, then, whether he be a citizen or an alien, he would appear to be immune from the jurisdiction, unless he has voluntarily submitted to the decision of the court.¹ These considerations would seem to show that jurisdiction depends, either upon presence in a country at the time of the suit (with which may be classed the possession of a place of business there), or upon submission. It is instructive in this connexion to notice that the Administration of Justice Act, 1920, in setting up the system of extended judgments for the British Empire,² provides as follows:

'No judgment shall be ordered to be registered under this section if the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court.'³

The more explicit provisions of the Foreign Judgments (Enforcement) Act, 1933, as we have seen, also clearly base jurisdiction upon submission or presence.⁴

Tests of
jurisdiction
as
stated by
English
judges

(i) Presence
in the
forum

The criterion, then, of jurisdiction in the international sense is either presence in, or voluntary submission to, the foreign jurisdiction.

(i) *Presence of defendant in the foreign country at the time of the action.* Jurisdiction is based upon the principle of territorial dominion. All persons who happen to be within a territorial dominion owe obedience to its sovereign power—obedience, that is to say, both to its laws and to the jurisdiction of its courts. This duty of obedience results from mere presence in the territory, and therefore the length of time for which the presence continues is immaterial.⁵ Thus in *Carrick v. Hancock*:⁵

A domiciled Englishman appeared to a writ which was served upon him in Sweden while he was on a short visit to that country. He left the country after entering an appearance and took no further part in the proceedings, which terminated in a judgment against him. It was held that despite his fleeting stay in Sweden an action on the judgment lay against him in this country.

There is, however, much to be said for the view that casual presence, as distinct from residence, is not a desirable basis of jurisdiction. Where, for instance, both parties are foreigners

¹ *Harris v. Taylor*, [1915] 2 K.B. 580, 589.

² *Supra*, pp. 601 et seqq.

³ S. 9 (2) (d).

⁴ *Supra*, pp. 603-6.

⁵ (1895), 12 T.L.R. 59; *Emanuel v. Symon*, [1908] 1 K.B. 302, 309; *Schibbsby v. Westenholz* (1870), L.R. 6 Q.B. 155, 161.

and the cause of action is based entirely upon facts occurring abroad and subject to foreign law, it is strange that the defendant should be bound by the decision of a court in whose jurisdiction he may chance to have been temporarily present. 'The court is not a convenient one for either of the parties, nor is it in a favourable position to deal intelligently either with the facts or with the law.'¹ In such a case, however, the court would have no hesitation at the instance of the defendant in staying the action as being vexatious.²

In the case of an artificial person, such as a corporation, residence for the purpose of jurisdiction exists only if, at the time of the commencement of the foreign action, substantial business is being carried on at some definite and more or less permanent place in the country of trial.³ In *Littauer Glove Corporation v. F. W. Millington Ltd.*:³

Presence of
corpora-
tions

A director of the defendants, an English company having no place of business in the United States, was staying at an hotel in New York and was making occasional use of an office belonging to an important customer of the defendants. A writ was served upon him in this office in his capacity as director of the defendant company, but he entered no appearance and took no steps in the proceedings and on the following day he sailed for England. Judgment by default was given against the company by the Supreme Court of the State of New York.

It was held that an action brought in England on this judgment could not succeed. The plaintiffs argued that the defendant company was present in New York in the person of the director, but Salter J. held that the company was not in any true sense of the term carrying on business in that State. If it was resident at the office of the customer it must also be resident at any place where the director happened to do business.

(ii) *Submission of defendant to the foreign court.* It is perfectly clear that if a person voluntarily and unsuccessfully submits his case as plaintiff to the decision of a foreign tribunal, he cannot afterwards, if sued upon the judgment in England, aver that he was not subject to the jurisdiction of that tribunal.⁴

(ii) Sub-
mission
when de-
fendant
was plain-
tiff in the
foreign
action

¹ 23 Ill. L.Rev. 427, cited in Read, *Recognition and Enforcement of Foreign Judgments*, p. 150.

² *Logan v. Bank of Scotland* (No. 2), [1906] 1 K.B. 141, 152.

³ *Littauer Glove Corporation v. F. W. Millington Ltd.* (1928), 44 T.L.R. 746. The English law on the subject is undeveloped, see Read, *op. cit.*, pp. 177-86. Compare *supra*, pp. 194-5, where the analogous case of service on a foreign corporation in England is considered.

⁴ *Schibsby v. Westenholz* (1870), L.R. 6 Q.B., at p. 161; *Novelli v. Rossi* (1831), 2 B. & Ad. 757.

Contract
to submit

What may be regarded as a particular example of submission arises where the defendant has previously contracted to submit himself to the foreign jurisdiction,¹ as, for instance, in *Feyerick v. Hubbard*,² where a domiciled British subject resident in London agreed to sell his patent rights to a Belgian, the contract of sale containing a provision that all disputes should be submitted to the jurisdiction of the Belgian courts. A less explicit agreement was held to be sufficient in *Copin v. Adamson*,³ where the facts were as follows:

A domiciled Englishman, resident in England, took shares in a French company whose articles of association provided that all disputes which might arise during liquidation should be submitted to the jurisdiction of a French court, and that process should be served at a domicile to be elected for a shareholder should he fail to elect one himself. Upon the company going into liquidation the French court gave judgment by default against the Englishman for the amount not paid up on his shares. To an action brought upon this judgment in England the defendant pleaded that he was not resident or domiciled in France before judgment, nor was he served with process, nor did he appear, nor had he any knowledge of the proceedings or opportunity to defend himself.

The plea failed. It was held that the articles constituted a contract on the part of every shareholder that he should be bound by a judgment so obtained. 'It appears to me', said Lord Cairns, 'that to all intents and purposes it is as if there had been an actual and absolute agreement by the defendant.'

Appearance
as defen-
dant in
foreign
action

The question that remains, however, is whether appearance as defendant in the foreign action will in all cases constitute sufficient submission to the jurisdiction of the court. The test of this is whether the appearance is voluntary, for a person who is not present in the country where a court sits, but who instructs counsel to appear, cannot be said to have submitted to the jurisdiction unless his intervention in the proceedings has been free from constraint. There is obviously a case of submission where the defendant has entered an appearance, fought

¹ *Emanuel v. Symon*, *supra*; *Copin v. Adamson* (1874), L.R. 9 Ex. 345, 354.

² (1902), 71 L.J.K.B. 509. Cp. *Hart & Son Ltd. v. Furness, Withy & Co. Ltd.* (1904), 37 N.S.R. 74 (a case in Nova Scotia cited by Read, *op. cit.*, p. 171), where a bill of lading provided that 'any claim or dispute, arising on this bill of lading, shall be determined according to English law in England'.

³ (1874), L.R. 9 Ex. 345; (1875), L.R. 1 Ex.D. 17; *Vallée v. Dumergue* (1849), 4 Exch. 290.

the action on its merits, and so taken his chance of obtaining a judgment in his own favour.¹

The case, however, that causes difficulty is where a defendant enters an appearance with the sole object of protesting the jurisdiction of the foreign court. If he should happen to possess property in the foreign country, the question whether such an appearance is to be regarded as voluntary is a matter of great moment. He is, indeed, faced with an awkward dilemma. Protest
against
jurisdiction
to save
property

If he takes no part in the proceedings, a judgment obtained against him by default will be satisfied by the seizure of his foreign property, though, owing to the absence of submission, his English property will be immune. If, on the other hand, he appears in the proceedings, but only in protest of the jurisdiction, and fails, then if an appearance of such a qualified nature constitutes submission, the ultimate enforcement of the judgment may lead to the seizure of his English property. Having failed to convince the foreign court that the action should not be entertained he will have rendered liable property which, had he done nothing, would have been immune. On principle it would seem that appearance limited to a protest against the foreign jurisdiction cannot reasonably be described as voluntary, but in what may be called the property cases the older decisions have made a distinction.

If the property has already been seized by the foreign court, an appearance in protest of the jurisdiction is not voluntary. On the other hand, if the defendant has entered an appearance merely to save property that will be liable to seizure should judgment be given against him by the foreign court, his appearance is treated as voluntary.²

This distinction is illusory, for the property, even though not seized before the trial of the action, will inevitably be seized in due process of law if the defendant remains quiescent and allows judgment to go against him by default. The argument, however, that seems to have weighed with the courts is that if he does something which he need not do, i.e. if he intervenes to save property that is in no immediate danger, he commits a voluntary act and must take the consequences. Far from being rewarded, foresight is to be penalized.

¹ *Molony v. Gibbons* (1810), 2 Camp. 502; *Guiard v. De Clermont*, [1914] 3 K.B. 145.

² *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; *Voinet v. Barrett* (1885), 55 L.J. Q.B. 39, 41, when the Court of Appeal differed from the view of Wills J. in the court below, 54 L.J. Q.B. 521; *Guiard v. De Clermont*, [1914] 3 K.B. 145; *Gaboriau v. Maxwell & Co.* (1908), *The Times* newspaper, Dec. 12.

Protest
against
jurisdiction
when no
property
to be
saved

In the troublesome case of *Harris v. Taylor*,¹ where there was no question of property to be saved, it was this gratuitous inter-meddling in proceedings that might safely have been ignored that led to the discomfiture of the defendant. The facts were as follows:

The plaintiff sued the defendant in the Isle of Man. The defendant was neither domiciled nor resident in the island, and therefore by the leave of the court he was served with a writ out of the Manx jurisdiction. He appeared 'conditionally' through counsel, who applied to have the proceedings stopped on the grounds (a) that the rules of the Manx High Court did not authorize service out of the jurisdiction; (b) that no cause of action existed within the jurisdiction; and (c) that he was not domiciled in the Isle of Man. Upon the dismissal of this application, the defendant took no further part in the action, but he was ultimately adjudged to pay £800 and costs. The present action was brought in England on that judgment.

It was held that the defendant's application to the Manx court was a submission to its jurisdiction. Buckley L.J. expressed his view in these words:

'When the defendant was served with the process, he had the alternative of doing nothing. He was not subject to the jurisdiction of the court, and if he had done nothing, although the court might have given judgment against him, the judgment could not have been enforced against him unless he had some property within the jurisdiction of the court. But the defendant was not content to do nothing; he did something which he was not obliged to do. . . . He went to the court and contended that the court had no jurisdiction over him. The court, however, decided against this contention and held that the defendant was amenable to its jurisdiction. In my opinion there was a voluntary appearance by the defendant in the Isle of Man court and a submission by him to the jurisdiction of that court.'²

Cave J. had reached the same conclusion in *Boissière v. Brockner*³ some fifteen years earlier, but in that case the defendant, instead of withdrawing from the French action after his unsuccessful protest against the jurisdiction, had proceeded to argue the case on its merits and had, indeed, been successful in the court of first instance.⁴

¹ [1915] 2 K.B. 580.

² *Ibid.*, at pp. 587-8.

³ (1889) 6 T.L.R. 85.

⁴ The case had a long history in the French courts. In the Tribunal of Commerce at Honfleur, judgment was against the defendant on the question of jurisdiction, but in his favour on the merits. The Court of Appeal at Caen affirmed the decision on both points. The Cour de Cassation at Paris set aside the judgment

Despite these decisions, however, it can be said with some assurance that to protest is not necessarily to submit. The tide is setting in the opposite direction.¹ In the converse case, where the question is whether a non-resident has submitted to the English court, the judges have refused to regard an appearance as voluntary where all that the defendant has done has been to deny his amenability to the jurisdiction. Thus, as we have seen, Lord Merivale in *Tallack v. Tallack*² repudiated the suggestion that an appearance, 'qualified by a distinct and reasoned denial of the existence of jurisdiction, could with any propriety be regarded as a submission to the exercise of the jurisdiction so denied'. In the later case of *In re Dulles*,³ the Court of Appeal confirmed this view and again held that to object to the international competence of the court is not in itself a submission to the jurisdiction. In the words of Denning L.J.:

Protest
against
jurisdiction
is not
submission

'I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court where he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all.'⁴

The Master of the Rolls and Denning L.J. also agreed that *Harris v. Taylor* is not an authority upon the general concept of submission. It must be limited to its precise facts. In that case, the defendant had unsuccessfully contended that the Manx court was not justified by its own procedural rules in assuming jurisdiction over him by allowing service of the writ outside the Isle of Man. Thus the question of jurisdiction had on the facts become *res judicata* between the parties.⁵

A foreign judgment that is given against an absent defendant in default of his appearance is clearly not actionable in England,

given in favour of the defendant and remitted the case to the Court of Appeal at Rouen for a further trial. The defendant, as he had done in each trial, objected to the jurisdiction, but asked for judgment on the merits, should his objection be overruled. Judgment was against him on both points.

¹ For instance, the Foreign Judgments (Reciprocal Enforcement) Act disallows the registration of a judgment if the defendant's appearance was limited to protesting the jurisdiction or to protecting property seized or threatened with seizure; *supra*, p. 605.

² [1927] P. 211; *supra*, p. 106.

³ [1951] Ch. 842.

⁴ *Ibid.*, at p. 850.

⁵ *Ibid.*, at pp. 849, 851. The Master of the Rolls also suggested that should the occasion arise the decision might be overruled by the House of Lords.

but is this so if he later moves to have the default judgment set aside and is unsuccessful? The question has not come before the English courts, but in two Canadian cases it was decided that a voluntary appearance of this nature is not to be regarded as a submission to the jurisdiction.¹

Do The result so far of our inquiry into the international
presence competence of foreign courts is that jurisdiction sufficient to
and submis- render a judgment actionable in England exists in two cases,
sion alone namely, where the defendant was present in the country of the
confer right forum at the time of the action, or where he submitted to the
of jurisdic- jurisdiction. The question now is whether there are any other
tion? grounds of competency. In *Emanuel v. Symon*,² Buckley L.J. quoting Fry J. in *Rousillon v. Rousillon*³ said:

'In actions *in personam* there are five cases in which the courts of this country will enforce a foreign judgment: (1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued;⁴ (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained.'

Is political
nationality
a ground
of jurisdic-
tion?

The last four cases given by the learned judge are covered by the two elements of presence and submission. It remains to consider the first case and to ascertain whether the fact that the defendant is a national of the foreign country where the judgment has been obtained is sufficient to render him amenable to the jurisdiction of the local courts. There is no English authority which contains an actual decision to this effect, but the truth of the proposition has been affirmed *obiter* in several cases.⁵

¹ *McLean v. Shields* (1885), 9 Ont. R. 699; *Esdale v. Bank of Ottawa* (1920), 51 D.L.R. 485; cited Read, *op. cit.*, p. 168. The point was taken in *Guindard v. De Clermont*, [1914] 3 K.B. 145, but in that case there had been proceedings in a higher court in which the defendant had taken part.

² [1908] 1 K.B. 302, 309; and see *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, 161; *Rousillon v. Rousillon* (1880), 14 Ch.D. 351, 371.

³ (1880), 14 Ch.D. at p. 371.

⁴ Presumably the learned judge means 'selected the forum as the one in which he would sue'; (1870), L.R. 6 Q.B. 161.

⁵ *Douglas v. Forrest* (1828), 4 Bing. 686; *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, 161; *Rousillon v. Rousillon* (1880), 14 Ch.D. 351, 371; *Emanuel v. Symon*, [1908] 1 K.B. 302, 309; *Harris v. Taylor*, [1915] 2 K.B. 580, 591. In *Gavin Gibson & Co. Ltd. v. Gibson*, [1913] 3 K.B. 379, 388, Atkin J. considered the dicta to be of such weight that he would 'probably feel compelled to follow them' should the occasion arise.

It is also adopted by textbook writers.¹ Nevertheless it is submitted with some confidence that nationality *per se* is not a reason which, on any principle recognized by private international law, can justify the exercise of jurisdiction. The argument usually advanced in its favour, namely that 'a subject is bound to obey the commands of his Sovereign, and, therefore, the judgments of his sovereign courts',² is no doubt true, but as Wolff pointed out it is not the duty of another sovereign to aid the enforcement of the obligation.³ Moreover, the connexion between a person and the State of which he is a national is often little more than sentimental. If a Romanian court were to give judgment *in personam* against a person who, though born in Romania, had left that country in his infancy and acquired a domicile in England without taking out letters of naturalization, it is difficult to appreciate the justification for holding the judgment actionable in England. Again, to make allegiance the basis of jurisdiction is scarcely practicable in the case of the British Commonwealth. A British subject resident in Victoria owes allegiance to the Crown, but that fact alone cannot render him liable on a judgment given against him in England.⁴ Finally, there is no question of reciprocal recognition, for the British nationality of a defendant does not suffice to found the jurisdiction of the English court.

If mere allegiance suffices to give jurisdiction, so also, it might be presumed, does domicile. The connexion between a man and the country in which he is domiciled is generally a very real one, but the tie of allegiance may be of the loosest description. An ineffective exercise of jurisdiction ought not to be tolerated, and it is undeniable that a judgment based on domicile is superior on the score of effectiveness to one based merely on allegiance. Yet the curious thing is that those writers who are content to make political allegiance a ground of jurisdiction deny without hesitation the sufficiency of domicile.

According to the decisions which have dealt with the matter up to the present, it is undoubted that the various circumstances considered above exhaust the possible cases in which a

Is domicile a ground of jurisdiction?

Locality of cause of action does not confer jurisdiction.

¹ Dicey, pp. 351, 356 (but hesitatingly); Westlake, p. 399; Foote, p. 398; Gravison (hesitatingly), p. 468; Schmitthoff, p. 465. It is rejected by Wolff, p. 126. But see Read, *op. cit.*, pp. 151-5.

² Dicey, p. 357.

³ Wolff, p. 126. He further points out that allegiance is not sufficient even in those Continental countries where nationality is the criterion of the personal law.

⁴ See the remarks of Scott J. in *Dakota Lumber Co. v. Rinderknecht* (1905), 6 Terr. L.R. 210, cited Read, *op. cit.*, p. 154.

foreign court possesses international competence. Thus it is not sufficient that the cause of action, as, for instance, a breach of contract or the commission of a tort, occurred in the foreign country.¹

‘The English courts will not enforce a German judgment against an Englishman for damages for breach of a contract to be performed in Germany when the Englishman was not in Germany at the issue of process and has not submitted to the German jurisdiction, for the Englishman can be sued on the contract in his own courts, which will do justice.’²

Possession
of property
does not
found
jurisdiction

Owing to the case of *Becquet v. MacCarthy*,³ however, it was for some time doubtful whether the possession of immovable property within the foreign country was sufficient to found jurisdiction.

In that case an action had been brought in Mauritius by the plaintiff for damage caused by a fire which started on the premises of the defendant, at that time Deputy Paymaster of the Forces. The defendant was absent from the island during the action. The local law provided that the interests of a resident, who absented himself from the island without leaving an attorney upon whom process might be served, should be in the keeping of the Procurator-General. This official was not required to communicate with the absent person. Judgment by default was given against the defendant.

To an action brought in England on this judgment the defendant pleaded his absence from the jurisdiction, but the plea was disallowed by the court. Lord Tenterden, though admitting that there might be some deficiency in the law of Mauritius, denied that the practice was so contrary to natural justice as to render the judgment void. It is safe to conclude that this decision would not be followed now. Lord Selborne in delivering the judgment of the Privy Council in a later case⁴ said:

‘Of *Becquet v. MacCarthy* it was said by great authority in *Don v. Lippmann*⁵ that “it had been supposed to go to the verge of the law”; and it was explained (as their Lordships think correctly) on the ground that “the defendant held a public office in the very Colony in which he was originally sued”. He still held that office at the time when he was sued; the cause of action arose out of, or was connected with it; and, though he was in fact temporarily absent, he might, as the holder of

¹ *Sirdar Gurdial Singh v. Faridkote*, [1894] A.C. 670, 684.

² *Per* Scrutton L.J., *Phillips v. Batho*, [1913] 3 K.B. 25, 30.

³ (1831), 2 B. & Ad. 951.

⁴ *Sirdar Gurdial Singh v. Faridkote*, [1894] A.C. 670, 685.

⁵ (1837), 5 Cl. & Fin. 1.

such an office, be regarded as constructively present in the place where his duties required his presence, and therefore amenable to the colonial jurisdiction.'

Whatever truth there may be in this explanation, it has now been decided by the Court of Appeal that neither the fact of possessing property in a foreign country nor the fact of making a partnership contract there relating to the property is sufficient to render the possessor amenable to the local jurisdiction.¹

The practice, illustrated by Order XI of the English R.S.C.,² under which the courts of a country assume jurisdiction over absentees, raises the question whether a foreign judgment given in these circumstances will be recognized in England.³ The authorities, so far as they go, are against recognition. The question arose in *Buchanan v. Rucker*,⁴ where it was disclosed that by the law of Tobago service of process might be effected upon an absent defendant by nailing a copy of the summons on the door of the court house. It was held that a judgment given against an absentee after service in this manner was an international nullity having no extra-territorial effect. Indeed, the suggestion that it should be actionable in England prompted Lord Ellenborough to ask with some disdain:

'Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?'

A less fanciful process again raised the question in *Schibbsby v. Westenholz*,⁶ where a judgment had been given by a French court against Danish subjects resident in England.

The mode of citation adopted in accordance with French law was to serve the summons on the Procureur Impérial, the rule being that if a defendant did not appear within one month after such service judgment might be given against him. Although not required by the law, it was customary in the interests of fair dealing to forward the summons to the consulate of the country where the defendant resided, with instructions to deliver it to him if practicable. In the instant case, the defendants were notified of the proceedings in this manner, but they failed to appear and judgment was given against them.

It was held that no action lay upon the judgment. Had the principle upon which judgments are enforceable been comity

¹ *Emanuel v. Symon*, [1908] 1 K.B. 302.

² *Supra*, p. 113.

³ See 2 *I. & C.L.Q.R.*, pp. 524-6 (J. A. Clarence Smith).

⁴ (1808), 9 East 192.

⁵ *Ibid.*, at p. 194.

⁶ (1870), L.R. 6 Q.B. 155.

or reciprocity, the Court of Queen's Bench intimated that having regard to the English practice of service out of the jurisdiction it would have reached a different conclusion. Since, however, the basis of enforcement is that a judgment imposes an obligation upon the defendant, it followed that there must be a connexion between him and the forum sufficiently close to make it his duty to perform that obligation. No such duty could be spelt out of the inactivity of the defendants, who were aliens resident in a foreign country.

Wright J. reached the same conclusion in a later case where a New Zealand judgment had been given against an absentee under an assumed jurisdiction substantially similar to that countenanced by the English Order xi.¹

Possible
effect of
Travers v.
Holley It is not without significance, however, that in this general context the Court of Appeal has recently acted on the basis of reciprocity and has held that what entitles an English court to assume divorce jurisdiction is equally effective in the case of a foreign court.² Moreover, Denning L.J. has stated *obiter* that a judgment given in the Isle of Man against an absentee, under rules for service out of the jurisdiction corresponding to those contained in Order xi, would undoubtedly be recognized in England.³

It would be unreasonable to confine the development of the law effected by *Travers v. Holley* to the single case of matrimonial jurisdiction. In principle it is equally applicable to jurisdiction assumed under provisions substantially similar to those appearing in Order xi. The obstacle to the extension of the doctrine of reciprocity to this particular field is, of course, *Schibsby v. Westenholz*, but the crux of reciprocal recognition is that the steps which qualify a foreign court to assume jurisdiction should have an approximate equivalent in English law, and perhaps a possible way of escape from that decision is to investigate the accuracy of the statement there made that the French judgment was given 'under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, give judgment against a resident in France'.⁴ It is submitted that there was a not inconsiderable disparity between the English and French rules.

¹ *Turnbull v. Walker* (1892), 67 L.T. 767.

² *Travers v. Holley*, [1953] P. 246; *Carr v. Carr* [1955] 1 W.L.R. 422; *supra*, p. 377.

³ *In re Dulles*, [1951] Ch. 842, 851.

⁴ *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155, 159.

(b) *Jurisdiction over actions in rem.*

The jurisdictional elements that must exist before a foreign judgment *in rem* can claim recognition in England are not difficult to specify, but it is first necessary to appreciate the correct meaning of this species of judgment. It may be defined as an adjudication upon the status of some particular subject-matter.¹

Meaning of judgment *in rem*

‘The action is *in rem*, that being, as I understood the term, a proceeding against a ship or other chattel in which the plaintiff seeks either to have the *res* adjudged to him in property or possession, or to have it sold under the authority of the court, and the proceeds, or part thereof, adjudged to him in satisfaction of his pecuniary claims.’²

The judgment in this type of action determines the right to, or the disposition of, some *res*.³ The effect, for instance, of a condemnation in the Prize Court is to vest the ship in the captors and thus to alter its status. Such a judgment differs fundamentally from one *in personam*. A judgment *in rem* settles the destiny of the *res* itself ‘and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence’;⁴ a judgment *in personam*, although it may concern a *res*, merely determines the rights of the litigants *inter se* to the *res*. The former looks beyond the individual rights of the parties, the latter is directed solely to those rights.⁵

Contrasted with judgment *in personam*

Holmes C.J. has described with his usual felicity the difference between the two kinds of judgment. Speaking of actions, he says:

Whether an action is *in rem* depends upon the number of persons affected

‘If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally, in theory at least, binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defence, the action is *in personam*, although it may concern the right to, or possession of, a tangible thing. If, on the other hand, the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established, and if any one in the world has a right to be heard on the strength of alleging facts which, if true, show an inconsistent interest, the proceeding is *in rem*. All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in*

¹ Phillimore, *International Law*, iv. 690.

² *The Henrich Björn* (1886), 11 App. Cas. 270, 276–7, per Lord Watson.

³ *Fraser Times & Co. v. Carr* (1900), 82 L.T. 698, 701.

⁴ *Dollfus Mieg et Compagnie S.A. v. Bank of England*, [1949] Ch. 369, 383, per Jenkins J.

⁵ *Castrique v. Imrie* (1870), L.R. 4 H.L. 414, 427.

rem depends on the number of persons affected. Hence the *res* need not be personified and made a party defendant, as happens with the ship in the Admiralty. It need not even be a tangible thing at all, as sufficiently appears by the case of the probate of wills. Personification and naming the *res* as defendant are mere symbols, not the essential matter.¹

Res not confined to tangible things As was observed by Holmes C.J. in the above passage, the *res* which forms the subject-matter of a judgment *in rem* is not necessarily confined to a tangible thing. If the essence of such a judgment is that it constitutes an adjudication upon status, it follows that certain judgments which declare the status of persons must be described as being *in rem*. This aspect of the matter was fully considered by the House of Lords in *Salvesen v. Administrator of Austrian Property*,² where Lord Dunedin described the position as follows:³

‘The other point on which I want to say a few words is the question of what is a judgment *in rem*. All are agreed that a judgment of divorce is a judgment *in rem*, but the whole argument of the judges in the Court of Session turns on the distinction between divorce and nullity. The first remark to be made is that neither marriage nor the status of marriage is, in the strict sense of the word, a *res*, as that word is used when we speak of a judgment *in rem*. A *res* is a tangible thing within the jurisdiction of the court, such as a ship or other chattel. A metaphysical idea, which is what the status of marriage is, is not strictly a *res*, but it, to borrow a phrase, savours of a *res*, and has all along been treated as such. Now the learned judges make this distinction. They say that in an action of divorce you have to do with a *res*, to wit, the status of marriage, but that in an action of nullity there is no status of marriage to be dealt with, and therefore no *res*. Now it seems to me that celibacy is just as much a status as marriage.’

Judgments *in rem* classified By way of classification it may be said that judgments *in rem* relate either to (i) immovables, or (ii) movables, or (iii) personal status.

(i) Relating to immovables There is no necessity to discuss the first class, for a decision upon the right or title to land is the simplest example of a judgment *in rem*.

(ii) Relating to movables Judgments *in rem* relating to movables call for fuller consideration. These may be regarded as falling into three sub-classes:⁴

(a) Judgments which immediately vest the property in a certain person as against the whole world.

¹ *Tyler v. Judges of the Court of Registration* (1900), 175 Mass. 71; Beale's *Cases on the Conflict of Laws* (1st ed.), i. 317, 320.

² [1927] A.C. 641. See *supra*, p. 360.

³ At p. 662, and see pp. 652–3, *per* Lord Haldane.

⁴ Westlake, s. 149.

These occur, for instance, where a foreign court of Admiralty condemns a vessel in prize proceedings.

- (b) Judgments which decree the sale of a thing in satisfaction of a claim against the thing itself.

A judgment which orders a chattel to be sold is a judgment *in rem* if the object of the sale is to afford a remedy, not by execution against the general estate of the defendant, but by appropriating the chattel in satisfaction of the plaintiff's claim. Such a judgment is not the same as the sentence of an Admiralty court in a prize case which immediately vests the property in the claimant, but it is analogous thereto if the money demand of the plaintiff in respect of which it is given is a demand against the chattel and not against the owner personally.¹ In all cases, therefore, the nature of a foreign judgment that has ordered the sale of some chattel must be determined by ascertaining whether according to the foreign law the original action was a suit against the chattel. The subject was elaborately considered by fourteen judges in the leading case of *Castrique v. Imrie*.²

The owner of a British ship mortgaged her to X while she was on a voyage. During the voyage the master drew a bill of exchange on the owner for the cost of certain repairs and indorsed it to a Frenchman at Le Havre. The indorsee brought an action on the bill against the master at Le Havre, and obtained a judgment which declared as follows: 'The Tribunal condemns Benson in his quality (capacity) of captain of the vessel *Anne Martin*, and by privilege on that vessel to pay to the plaintiff' the amount of the bill. The court declared the master to be free from arrest to which otherwise he would have been liable. A higher court, though having an opinion from the Attorney-General that by English law the mortgagee had a better right than the indorsee, affirmed the decision and ordered the ship to be sold. The ship, having been sold, ultimately arrived in England, and the mortgagee brought an action in the Court of Common Pleas to recover her, on the ground that the sale in France was illegal and void.

The decision necessarily depended upon the nature of the French judgment. If it was *in rem*, then the plaintiff must fail, for when a court of competent jurisdiction adjudicates upon the status of a thing the status so declared is universally recognized as binding upon the whole world. If the judgment was *in personam* it was not binding on the mortgagee, since he had been absent from the French proceedings. The Court of

¹ *Imrie v. Castrique* (1860), 8 C.B. (N.S.) 405, 411-12, Cockburn C.J.

² (1860), 8 C.B. (N.S.) 1; reversed, *ibid.*, p. 405; reversal affirmed (1870), L.R. 4 H.L. 414.

Common Pleas held the judgment to be *in personam*, but the Exchequer Chamber and the House of Lords reversed this decision.

The 'privilege' which the judgment created on the ship was, according to French law, a species of lien, and although the proceedings were started against the master as well as against the ship, the sale was ordered, not in execution of the judgment debt, but in enforcement of the lien.

'I think', said Bramwell B., 'the proceeding was, if against the master, also against the ship; and the ship was specifically ordered to be sold, not as the master's ship or the debtor's ship, but as being the ship on which there was a lien or privilege.'¹

A more striking example of the manner in which English courts pay recognition to foreign judgments *in rem* is afforded by *Minna Craig Steamship Co. v. Chartered Bank of India*,² for there the lien which had been declared by a German court was one which conflicted with the principles of English internal law.

(c) Judgments which order movables to be sold by way of administration.³

If, in the course of administering an estate in bankruptcy or on death, a foreign court orders the sale of chattels, the sale will be regarded as conferring a title upon the purchaser valid in England.⁴ Presuming that the court is the competent body to undertake the administration, its judgment must bind all persons who might have pursued their claims against the estate.

(iii) Relating to personal status

Coming to the third class of judgments *in rem*, we have already seen that the word *res*, when used in this connexion, is not confined to tangible things. It includes those human relationships, such as marriage, which do not originate merely in contract, but which constitute what may be called institutions recognized by the State.⁵ A foreign court which issues, for instance, a decree of divorce, of nullity of marriage or of legitimacy will, if competent in respect of jurisdiction, be deemed to have pronounced a judgment *in rem* that is conclusive in England and binding on all persons. Moreover, judgments *in personam* which are ancillary to such judgments *in rem* are

Judgments *in personam* that are ancillary to judgments on status

¹ 8 C.B. (N.S.), at p. 420.

² [1897] 1 Q.B. 55; affirmed p. 460.

³ Westlake, s. 149.

⁴ See *The Segredo* (1853), 1 Spinks Ecc. & Ad. 36, at p. 58 (bankruptcy); *In re Trufort, Trafford v. Blanc* (1887), 36 Ch.D. 600 (succession).

⁵ Cp. Lord Haldane in *Salvesen's Case*, [1927] A.C. at pp. 652-3.

equally binding in England. An illustration of this is afforded by *Phillips v. Barho*,¹ where the facts were these:

The plaintiff, domiciled in India, obtained a divorce from his wife in an Indian court, and was awarded damages against the defendant, as co-respondent. The defendant was not present in India at the time of the suit, nor did he submit to the jurisdiction. The plaintiff then sued him in England to recover the damages awarded by the Indian judgment.

This judgment, if treated as one *in personam*, was not actionable in England, since the Indian court had no jurisdiction *in personam* over the defendant. Neither, in the opinion of the learned judge, could the plaintiff sue in England on the original cause of action, for the English court has divorce jurisdiction only where the parties are domiciled in England. Scrutton J., however, avoided the difficulties by holding that the judgment awarding damages was ancillary to the judgment *in rem* dissolving the marriage,² and, as such, was probably conclusive everywhere, and at any rate was conclusive in another part of the British Empire.³

'Marriage and the dissolution of marriage are matters of status, and the judgments of the Indian court in this matter are *in rem* and bind the world. Ancillary and accessory to the judgment as to status is the power to give damages against the person causing the marriage to be dissolved. . . . The English courts will recognize and enforce the judgments as to status of the Indian courts in matters within their jurisdiction, and I think they will also recognize and enforce the ancillary order as to damages, such as they themselves make in similar cases.'⁴

Having classified judgments *in rem* we are now in a position to consider the question of jurisdiction. In the case of a movable or an immovable the principle is that such a judgment will not be entitled to extra-territorial recognition, unless at the time when it was given the *res litigiosa* was situated in the country where the court sat. Jurisdiction belongs exclusively to the *forum situs*. The principle of effectiveness governs. Thus it has always been recognized that exclusive jurisdiction over immovables

What constitutes jurisdiction
Where subject-matter is a movable or an immovable

¹ [1913] 3 K.B. 25.

² It has now been decided that an action for damages against an adulterer is not necessarily ancillary to the divorce judgments, *Jacobs v. Jacobs and Geen*, [1950] P. 146, *supra*, p. 373.

³ 'A holding which created a new type of judgment—a hybrid obtained by crossing an action *in rem* with an action *in personam*, with the dominant jurisdictional characteristics being possessed by the former' Read, *op. cit.*, p. 264.

⁴ *Per* Scrutton J. at p. 32. The decision has been subjected to a devastating criticism by Read, *Recognition and Enforcement of Foreign Judgments*, pp. 264–7.

belongs to the courts of the *situs*. It is the same with movables.¹

'A nation within whose territory any personal property is actually situate has as entire dominion over it while therein, in point of sovereignty and dominion, as it has over immovable property situate there. It may regulate its transfer, and subject it to process and execution, and provide for and control the uses and disposition of it, to the same extent that it may exert its authority over immovable property.'²

Jurisdiction where subject-matter not a tangible thing

The existence of adequate jurisdiction where the judgment is concerned with the status of persons depends upon other considerations which have already been examined in the previous chapters of this book. Thus, for instance, jurisdiction in divorce³ and to a certain extent in nullity⁴ depends upon domicil.

B. Finality of the judgment

Judgment must amount to *res judicata* in country where given

A foreign judgment does not create a valid cause of action in England unless it is *res judicata* by the law of the country where it was given.⁵ It must be final and conclusive in the sense that it must be unalterable in the court which pronounced it.

Must be a final determination of the issue

Thus one inquiry is whether the judgment is provisional or whether, so far as the adjudging court is concerned, it sets the issue between the parties at rest for ever. If it is in the nature of a provisional order which contemplates that a fuller investigation leading to a final decision may later be held, it creates no obligation that is actionable in England. This aspect of the meaning of finality and conclusiveness is illustrated by the leading case of *In re Henderson, Nouvion v. Freeman*,⁶ where the facts were as follows:

In re Henderson

X, who had sold certain land in Seville to Y, brought an 'executive' action in Spain against Y and obtained a 'remate' judgment for a large sum of money. There are two kinds of proceedings under Spanish law: executive or summary proceedings, and 'plenary' or ordinary proceedings. In an executive action, upon proof of a *prima facie* case, the judge without notice to the defendant makes an order for the attachment of his property. Notice of the attachment is given to the defendant and he is at liberty to appear and defend the action. But the defences open to him are limited in number, and in particular he cannot set up any de-

¹ *Castrigue v. Imrie* (1870), L.R. 4 H.L. 414.

² Story, s. 550.

³ *Supra*, pp. 366, 374.

⁴ *Supra*, pp. 343, 348, 359, 360.

⁵ *In re Henderson, Nouvion v. Freeman* (1887), L.R. 37 Ch.D. 244, 255, Lindley L.J.; *In re Riddell* (1888), 20 Q.B.D. 512, 516, Lord Esher.

⁶ (1889), L.R. 15 App. Cas. 1.

fence which denies the validity of the transaction upon which he is sued. If, for instance, the action is for money due under a writing, he may prove that he has paid the sum or that he has been released, but he cannot deny the execution of the instrument nor attack it on the ground of fraud, misrepresentation, duress or the like. A plaintiff who fails can later begin plenary proceedings in which the whole merits of the case are examined, and he cannot be met by the plea of *res judicata*. If the plaintiff succeeds in the executive action, he obtains a 'remate' judgment which orders execution to issue for a certain sum of money. The defendant, however, may then bring a plenary action before the same judge, and in this may set up every defence that is known to the law.

It was held by the House of Lords, affirming the Court of Appeal, that an action brought by *X* against *Y* in England on the 'remate' judgment must fail. A judgment is not final and conclusive unless it once and for all adjudicates upon the rights and liabilities of the parties, and this is not true of a 'remate' judgment that is liable to be abrogated or varied by the adjudicating court. It is not *res judicata* with regard to either party, neither does it extinguish the original cause of action.

The necessity for finality and conclusiveness appears in a slightly different aspect in the cases dealing with alimony. It is a familiar doctrine of domestic English law that no action can be brought in the King's Bench Division to recover alimony which is due under an order of the Divorce Court. The reason is that, since the Divorce Court can vary its own order at any time both with regard to past as well as future instalments, there is no final adjudication upon which to proceed. 'The decree is not final and conclusive as a matter of law, because it does not purport to be final and conclusive as a matter of fact.'¹ The same consideration affects foreign alimentary decrees where it is sought to enforce them in England.² Thus in *Harrop v. Harrop*³ the issue was an order for alimony made in Perak.

The law of Perak on this matter is as follows. A magistrate may order a person to pay a monthly allowance for the maintenance of his wife, and, if such order is disregarded, may direct the amount due to be levied in the manner in which fines are levied. Upon application by the husband or wife and upon proof of a change in the circumstances of the parties, the magistrate may vary the amount to be paid.

¹ *McGuire v. McGuire* (1921), 50 Ont. L.R. 100, at p. 104, cited 26 *Australian L.J.* 407 (J. G. Fleming).

² *Harrop v. Harrop*, [1920] 3 K.B. 386; *In re Macartney*, [1921] 1 Ch. 522; *Beatty v. Beatty*, [1924] 1 K.B. 807.

³ [1920] 3 K.B. 386.

In the present case a magistrate had ordered the payment of a monthly sum, and later, when this fell into arrears, had ordered that payment of the arrears should be enforced by the appropriate method. The wife failed in the action which she brought in England upon these orders. Sankey J. in the course of his judgment put the gist of the matter in these words:

'In my view a judgment or order cannot be said to be final and conclusive if (1) an order has to be obtained for its enforcement, and (2) on application for such an order the original judgment is liable to be abrogated or varied.'¹

If a court is empowered to vary the amount of future payments of alimony but cannot alter its order as to accrued instalments, then instalments that are already due under the foreign judgment may be recovered by action in England.² *Harrop v. Harrop* is not inconsistent with this rule, for in that case no evidence was given to show that the amount of accrued instalments was unalterable.

Pending
appeal
abroad
no bar to
action in
England

The requirement of finality means that the judgment must be final in the particular court in which it was pronounced.³ It does not mean that there must be no right of appeal. Neither the fact that the judgment may be reversed on appeal, nor even the stronger fact that an actual appeal is pending in the foreign country, is a bar to an action brought in England,⁴ though where an appeal is pending the English court has an equitable jurisdiction to stay execution, which it will generally exercise.⁵ If, however, the effect under the foreign law of a pending appeal is to stay execution of the judgment, it would seem that in the interim the judgment is not actionable in England.⁶

C. The judgment, if in personam, must be for a fixed sum

Foreign
judgment
must be for
a definite

As we have seen, the unsuccessful party to a foreign action is regarded for procedural purposes as having implicitly promised

¹ At p. 399. The Maintenance Orders (Facilities for Enforcement) Act, 1920, provides machinery by which maintenance orders made in any part of H.M.'s dominions outside the United Kingdom may be registered in an English court. A registered order has the same force and effect as if it had been made by the court in which it is registered. See, for example, *Harris v. Harris*, [1949] 2 All E.R. 318; *Pilcher v. Pilcher*, [1955] P. 319.

² *Beatty v. Beatty*, [1924] 1 K.B. 807.

³ *Beatty v. Beatty*, *supra*, at pp. 815-16, *per* Scrutton L.J.

⁴ *Scott v. Pilkington* (1862), 2 B. & S. 11.

⁵ *Scott v. Pilkington*, *supra*; *In re Henderson, Nouvion v. Freeman* (1889), L.R. 15 App. Cas. 1, 13.

⁶ *Patrick v. Shedden* (1853), 2 E. & B. 14, especially judgment of Wightman J.

to pay the amount in which he has been condemned.¹ The law, however, implies a promise to pay a definite, not an indefinite, sum.² Unless in an action *in personam* the foreign court has definitely and finally determined the amount to be paid, no action is maintainable in England.³ In *Sadler v. Robins*⁴ a court in Jamaica had decreed that the defendant should pay to the plaintiff £3,670. 1s. 9½d., first deducting therefrom the full costs expended by the defendant, such costs to be taxed by a master of the court. It was held that until taxation the plaintiff had no cause of action in England, since the sum due on the Jamaican decree was indefinite. A sum, however, satisfies the requirement of certainty if it can be ascertained by a simple arithmetical process.⁵

2. CONCLUSIVENESS OF FOREIGN JUDGMENTS

The extent to which a foreign judgment is effective as *res judicata* has not always been clear. Even as late as 1839, Tindal C.J. was able to say:

‘Great doubts have formerly existed, and some degree of doubt still exists, whether a judgment so recovered [i.e. abroad] is conclusive between the parties, or whether the matter may be opened and agitated in this country.’⁶

Formerly
doubtful
whether
judgment
impeach-
able on
merits

The controversy was whether a foreign judgment could be impeached on its merits. Adherents to the theory of comity maintained that, since English courts are under no obligation to enforce foreign judgments, but only do so *ex gratia* and from a wish to extend the limits of justice, it would be an extension of injustice to enforce a judgment which ought never to have been given. Those opposed to this view argued that ‘facts can never be inquired into so well as on the spot where they arose, laws never administered so satisfactorily as in the tribunals of the country governed by them’, and that if English courts were to undertake the rehearing of cases which had already been decided by the appropriate foreign court great injustice would generally be caused.⁷

¹ *Grant v. Easton* (1883), L.R. 13 Q.B.D. 302.

² *Sadler v. Robins* (1808), 1 Camp. 253, 256, Lord Ellenborough.

³ *Sadler v. Robins, supra*; *Henderson v. Henderson* (1844), 6 Q.B. 288.

⁴ *Supra*.

⁵ *Beatty v. Beatty*, [1924] 1 K.B. 807.

⁶ *Smith v. Nicolls* (1839), 5 Bing. N.C. 208, 221.

⁷ The above is taken practically verbatim from *S.L.C.* (13th ed.), ii. 717-18, notes to *Duchess of Kingston's Case*.

To impeach
merits is
contrary to
doctrine of
obligation

When, however, it was established that the enforceability of a foreign judgment depended upon whether or not a legal obligation had been imposed on the defendant,¹ the first view, that the merits of a foreign decision are open to review in England, became untenable. It would stultify this doctrine of obligation if the English court were to arrogate to itself liberty to examine whether the foreign court ought in the circumstances to have imposed any obligation upon the defendant. Such an attitude would force the plaintiff back to his original cause of action, and it would avail him little that he had already been successful abroad. If we are prepared to enforce an obligation as having been imposed by a competent court, we must admit that the obligation was properly imposed. The confusion that formerly surrounded this subject was no doubt caused by the omission to distinguish between a right to examine a judgment for want of jurisdiction and a right to attack it on its merits.² A foreign judgment must be examinable on the first ground, for an obligation can be imposed only by an authority which is competent to bind the defendant, but once it is admitted that an authority had such competence, it is inconsistent with the doctrine of obligation to review the correctness of any particular command that it may have issued.

Now
settled
that
judgment
not im-
peachable
on merits

It is now established beyond any doubt that in an action on a foreign judgment the English court is not entitled to investigate the propriety of the proceedings in the foreign court.³ Erroneous judgments delivered by a foreign court are not void in England.⁴ The merits of the case have been argued and determined, and if one of the parties is discontented with the decision his proper course is to take appellate proceedings in the forum of the judgment. The English tribunal, in other words, cannot sit as a Court of Appeal against a judgment pronounced by a court which was competent to exercise jurisdiction over the parties.⁵ The defendant in England may show that the foreign court had no jurisdiction to try the case, or he may plead a limited number of defences, such as fraud, which

¹ *Supra*, p. 597.

² *S.L.C.* ii. 720.

³ *Pemberton v. Hughes*, [1899] 1 Ch. 781, 790; *Messina v. Petrocchino* (1872), L.R. 4 P.C. 144; *Bank of Australasia v. Nias* (1851), 16 Q.B. 717; *Henderson v. Henderson* (1844), 6 Q.B. 288; *Vanquelin v. Bouard* (1863), 15 C.B. (N.S.) 341; *Godard v. Gray* (1870), L.R. 6 Q.B. 139; *Vadala v. Lawes* (1890), 25 Q.B.D. 310, 316.

⁴ *Imrie v. Castrique* (1860), 8 C.B. (N.S.) 405, at p. 428, Martin B.

⁵ *Dent v. Smith* (1869), L.R. 4 Q.B. 414, 446; *Imrie v. Castrique*, *supra*.

will be considered later,¹ but he is not at liberty to show that the court mistook either the facts or the law upon which its judgment was founded.²

In pursuance of this doctrine it was early established that a judgment debtor sued in England could not impeach a foreign decision, either on the ground that in the original proceedings he had been denied some defence available to him, or on the ground that the foreign court had mistaken its own law or had reached an erroneous conclusion as to the facts. Thus in *Henderson v. Henderson*:³

No defence that foreign court mistaken as to facts or as to its own law

It was pleaded to an action on a Newfoundland judgment, (a) that the plaintiff had brought the original suit in right of her husband without proving any right to sue in a representative character, and (b) that the defendant had a right of set-off against the husband.

Both these pleas were held bad. Again, in *Ellis v. M'Henry*:⁴

Judgment had been recovered in Canada in an action which would have failed had the defendant pleaded a certain composition deed.

Defences available in foreign court cannot be raised here

The plaintiff sued on this judgment in England, and the question was whether the defendant was entitled at that stage to set up the deed as a defence. Bovill C.J. dismissed the contention in these words:

'We are accustomed, and indeed bound, to give effect to final judgments of the courts of other countries and of our colonies, where they possess a competent jurisdiction which has been duly exercised; and the correctness of such judgments is not allowed to be again brought into contest in our courts. The only ground on which the judgment in [the present case] was sought to be impeached upon the pleadings before us, was that there was a defence to the original claim by the discharge under the deed; but that would go to impeach the propriety and correctness of the judgment, and is a matter which cannot be gone into after the judgment has been obtained, or in this action which is brought to enforce it; *ne lites immortales essent dum litigantes mortales sunt*.'

The more serious question that was left open was, whether a foreign judgment could be impeached on the ground that the court had made an obvious mistake with regard to English law when purporting to give a decision according to that law. If it is apparent that a foreign judgment has been founded on a mistaken notion of English law, is it conclusive in England?

Foreign judgment unimpeachable even if based on mistake as to English law

¹ *Infra*, pp. 635 et seqq.

² *Bank of Australasia v. Nias*, *supra*, at p. 735; *Godard v. Gray*, *supra*, at p. 150.

³ (1844), 6 Q.B. 288.

⁴ (1871), L.R. 6 C.P. 228.

It is now decided that such a mistake does not excuse the defendant from performing the obligation that has been laid upon him by the judgment.¹ The doctrine that a foreign judgment cannot be impeached as to merits has been carried to its logical conclusion. Thus in *Godard v. Gray*:²

The plaintiffs, who were Frenchmen, sued the defendants (Englishmen) in France on a charter-party, the proper law of which was English law. The charter-party contained the clause: 'Penalty for non-performance of this agreement estimated amount of freight.' The effect of such a clause under English law is not to quantify the damages exactly, but to leave them to be assessed according to the actual loss suffered; but the French court, believing that the language of the charter-party was to be understood in its natural sense, fixed the damages payable by the defendant at the exact amount of freight. When sued upon the judgment in England, the defendants pleaded this mistaken view of English law in defence. The plea failed. The court held that there can be no difference between a mistake as to English law and any other mistake.

Foreign
court
must have
had inter-
nal com-
petence

Lindley L.J. once said that the jurisdiction which alone is important in connexion with a foreign judgment is the competence of the foreign court in the international sense. 'Its competence or jurisdiction in any other sense is not regarded as material by the courts of this country.'³ According to this view, action will lie in England upon a foreign judgment although delivered by a court that, according to its own internal law, had no jurisdiction whatsoever over the cause of action. If, for instance, as is possible in the case of the English County Court, the foreign court has adjudicated upon a claim in excess of the legally permitted amount, is it to be no answer to an action on the judgment in England that the court lacked internal jurisdiction? To admit this would be inconsistent with principle. According at any rate to the English rule, a judgment delivered by a court with no jurisdiction is a complete nullity, and it seems curious that what was null and void in the foreign country can be regarded as valid for the purposes of an English action. Such a foreign judgment creates no right whatsoever in favour of the plaintiff, yet it is because a right has been vested in him that, according to the doctrine of obligation, he may sue on the judgment in England. The dictum of Lindley L.J., for it was nothing more, was not applied in *Papadopoulos v. Papadopoulos*,⁴

¹ *Gastrique v. Imrie* (1870), L.R. 4 H.L. 414; *Godard v. Gray* (1870), L.R. 6 Q.B. 139.

² (1870), L.R. 6 Q.B. 139.

³ *Pemberton v. Hughes*, [1899] 1 Ch. 781, 791.

⁴ [1930] P. 55; *supra*, pp. 386.

where one of the grounds upon which the Cypriot decree of nullity was held to be ineffective was that the court had no power by the law of Cyprus to declare the marriage null and void.

On the other hand, it is essential to observe that if the foreign court is internally competent the fact that it has erred in its own rules of procedure is no answer to an action in England. This is the explanation of *Pemberton v. Hughes*,¹ the case in which Lindley L.J. delivered his dictum. In that case:

Procedural mistake of foreign court no answer to English action

A decree for divorce had been pronounced by the competent court in Florida in an undefended suit brought by a husband against his wife, both parties being domiciled and resident in Florida. It appeared that she had received only nine days notice of the proceedings instead of ten days as required by the law of Florida. It was held by the Court of Appeal that the decree was final and was binding in England.

Lindley L.J. in the course of his judgment said:

'All that the English courts look to are the finality of the judgment and the jurisdiction of the court, in this sense and to this extent—namely its competence to deal with the sort of case that it did deal with, and its competence to require the defendant to appear before it.'²

In other words, the Florida court was not only internally competent to deal with a case of divorce, but also internationally competent, since the defendant was domiciled in Florida. The learned judge then concluded as follows:

'If the court had jurisdiction in this sense, and to this extent, the courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided that no substantial injustice, according to English notions, has been committed.'³

At first sight the decision of the Court of Common Pleas in *Vanquelin v. Bouard*⁴ may seem difficult to reconcile with this statement of the law.

This was an action in England upon a judgment obtained in France on a bill of exchange. The defendant pleaded that by French law the French court had no jurisdiction, since the defendant was not a trader and was not resident at Orleans where the bills were drawn. The plea was disallowed.

If the plea meant that the French action had been brought in the wrong court⁵ and if this were so, it is arguable that the

¹ [1899] 1 Ch. 781.

² At p. 790.

³ At pp. 790-1.

⁴ (1863), 15 C.B. (N.S.), 341.

⁵ See *Pemberton v. Hughes*, [1899] 1 Ch. 781, 791, per Lindley L.J.

judgment was a nullity. Erle C.J. denied, however, that the court lacked internal jurisdiction. He said:

'I am of opinion that the judgment of a foreign court is valid if the court has jurisdiction over the person and over the subject-matter of the action: and it seems to me upon this plea that the court . . . had jurisdiction over the subject-matter of the suit in which the judgment was obtained, viz. the liability of the acceptor of a bill of exchange, and that if it were a matter of defence that the defendant was not a trader or not resident within the jurisdiction of the court, it was a matter of defence that ought to have been set up by way of defence in that court, and cannot avail the defendant in an action upon the judgment here.'¹

Thus the French tribunal was competent 'to deal with the sort of case that it did deal with', to quote the words of Lindley L.J. again, though perhaps the defendant might have pleaded in defence that he personally was not within that competence. In explanation of both *Pemberton v. Hughes* and *Vanquelin v. Bouard* a modern writer says: 'The court had competence in the sort of case involved, but there was a mistake or irregularity of procedure in the exercise of that competence which rendered the right created by the judgment merely voidable, capable of being made void by subsequent proceedings.'² A significant feature of *Vanquelin v. Bouard* is that the defendant let the French proceedings go by default. Further, he did not plead in the English action that the French judgment was a complete nullity.

Con-
clusiveness
of foreign
judgments
sum-
marized

A foreign judgment given by a court of competent jurisdiction is *res judicata* in two senses: it furnishes the successful party with a separate cause of action enforceable in England and provides him with an effective defence if he is sued by the other party in England on the original cause of action. In the words of Lord Campbell:

'I was clearly of opinion that a foreign judgment might be pleaded as *res judicata* because the foreign tribunal has clearly jurisdiction over the matter, and both parties having been regularly brought before the foreign tribunal, and that tribunal having adjudged between them, I think that such a judgment would be a bar to a subsequent suit in this country for the same cause.'³

Thus the satisfied judgment of a foreign court, even though the amount awarded is not full compensation for the loss suffered,

¹ *Vanquelin v. Bouard* (1863), 15 C.B. at p. 368.

² Read, *Recognition and Enforcement of Foreign Judgments*, p. 100.

³ *Ricardo v. Garcias* (1845), 12 Cl. & Fin. 368, 401; i.e. against the successful defendant.

is a good defence to an action brought by the plaintiff in England for the residue of his claim.¹ Having elected to sue the defendant in the foreign country and having received the amount awarded, he cannot seek a better judgment from the English court in respect of the same injury.² But if he has two causes of action founded on the same damage against separate defendants, as where the drivers of two vehicles have collided and caused him injury, a satisfied judgment of a foreign court against one of them does not bar him from suing the other in England.³ He cannot, however, sustain such an action if the amount awarded him by the foreign judgment is sufficient to compensate him fully for the damage suffered, for English law does not tolerate double satisfaction.⁴

The principle of *res judicata* applies both to actions *in personam* and actions *in rem*, for as regards their degree of conclusiveness these actions differ from each other only in the number of persons who are bound by the judgment. A judgment *in personam* binds the parties and their privies if they litigate the same issue in England. A judgment *in rem* has a wider operation, since it is conclusive against all the world.⁵

‘Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any other tribunal.’⁶

Both judgments *in rem* and judgments *in personam* are conclusive upon the point decided, but in the former ‘the point’, since it is the determination of status, is conclusive against the whole world, while in the latter, since it is unconcerned with status, it is conclusive only between parties and privies.⁷

3. DEFENCES AVAILABLE TO THE DEFENDANT

Despite the fact that the foreign judgment upon which the defendant is sued is final and conclusive, it is still open to him to escape liability by pleading any one of three defences. These are that the judgment has been obtained by fraud, or that it is

¹ *Taylor v. Hollard*, [1902] 1 K.B. 676.

² *Barber v. Lamb* (1860), 8 C.B. (N.S.) 95, 100, *per* Erle C.J.

³ *Kohnke v. Karger*, [1951] 2 K.B. 670.

⁴ *Kohnke v. Karger*, *supra*.

⁵ *Supra*, pp. 621 et seqq.

⁶ Story, s. 592, adopted by the House of Lords in *Castrique v. Imrie* (1870), L.R. 4 H.L. 414, 428-9.

⁷ *Ballantyne v. Mackinnon*, [1896] 2 Q.B. 455, 462.

contrary to natural justice, or that it is repugnant to public policy as understood in England.

(i) *Foreign judgment obtained by fraud.*

Domestic
judgments
impeach-
able for
fraud

If we omit all reference to private international law for the moment, we find a well-established rule that a domestic judgment may be impeached on the ground that it was obtained by fraud.¹ The unsuccessful party, instead of appealing or applying for a new trial, may bring an independent action to set aside the judgment.² It is not a method which is encouraged,³ or one which, owing to the strict burden of proof imposed upon the plaintiff, easily succeeds. His action will be struck out as vexatious and frivolous unless the statement of claim gives particulars of some fraudulent act which, if proved, would entitle him to succeed, and unless it affords some explanation why the fact complained of was not adduced in evidence during the original proceedings.⁴

The mean-
ing of
'fraud'

The point, however, which has an important bearing upon private international law, is the meaning of 'fraud' in this connexion. Of what nature must the fraud be in order to justify the setting aside of a domestic judgment? The answer is contained in the classic judgment of Grey C.J. in *The Duchess of Kingston's Case*,⁵ which definitely established that judgments are impeachable for fraud. Referring to the judgment of a Spiritual Court, he said:

'But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the point, and *not to be impeached from within*; yet, like all other acts of the highest judicial authority, it is impeachable *from without*: although *it is not permitted to show that the court was mistaken, it may be shown that they were misled.*

'Fraud is an extrinsic, collateral act; which vitiates the most solemn proceedings of Courts of Justice.'

The essential distinction, therefore, is between mistake and trickery. An unsuccessful litigant cannot bring an independent action to set aside a judgment as having been erroneous with

¹ *Duchess of Kingston's Case* (1776), 2 S.L.C. 717; Kerr on *Fraud*, pp. 301, 365; Spencer Bower on *Actionable Misrepresentation*, pp. 358-63.

² *Flower v. Lloyd* (No. 1) (1887), 6 Ch.D. 297; *Jonesco v. Beard*, [1930] A.C. 298.

³ *Flower v. Lloyd* (No. 2) (1879), 10 Ch.D. 327, 333-4, James L.J., though Baggallay L.J. dissented.

⁴ *Birch v. Birch*, [1902] P. 130, 136, Vaughan Williams L.J.

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regard to the law or the facts, for appellate proceedings are available to him; but he can bring such an action on the ground that the court was imposed upon. He must be able to point to some fact 'from without', some fact which was not before the court that pronounced the judgment. The facts upon which he bases his present claim must not have been in issue in the original action.

That this is the nature of the fraud which alone justifies an action to set aside a judgment becomes evident upon a consideration of the decisions in which such actions have succeeded. Thus, judgments have been set aside upon proof that the parties acted in collusion;¹ or that an essential document was suppressed;² or that a forged will,³ a false affidavit⁴ or certain false and counterfeit documents⁵ were put in evidence; or that the judgment debtor was fraudulently induced not to appear in the original proceedings;⁶ or that fresh material evidence has been obtained since the judgment which could not have been obtained earlier.⁷ On the other hand, it has been held that alleged perjury before the original court is not a sufficient ground for the setting aside of a judgment.⁸ Moreover, the facts upon which the case for setting aside the judgment rests must not have been known to the plaintiff at the time of the original hearing. He must show that he discovered them later.⁹ The principle, then, to be borne in mind is that the issue which was raised in the original proceedings cannot be reopened, or, what is the same thing, that an action to set aside a judgment cannot be used as a means of impeaching that judgment on its merits.

Examples
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³ *Priestman v. Thomas* (1884), 9 P.D. 210.

⁴ *Loyd v. Mansell* (1722), 2 P. Wms. 73.

⁵ *Cole v. Langford*, [1898] 2 Q.B. 36.

⁶ *Wyatt v. Palmer*, [1899] 2 Q.B. 106, 109.

⁷ *Burr v. Anglo-French Banking Corp.* (1933), 49 T.L.R. 405. The actual point decided was that a judgment can be set aside if it has been obtained against a corporation (in this case a Chilean corporation) which had no *de jure* existence at the time of the original proceedings.

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⁹ *Birch v. Birch*, [1902] P. 130 (will alleged to be forged).

fraud,¹ and decisions are to be found which exemplify the proper application of this rule, i.e. which have applied it to cases where the court was imposed upon by some fraudulent trick discovered later.

Thus in *Ochsenbein v. Papelier*:²

Foreign
court im-
posed upon
by a trick

A French seller, in the course of a dispute in Paris with an English buyer, produced a writ showing that he had begun an action to recover the price of the goods. When remonstrated with, however, he burnt the writ then and there and agreed to refer the dispute to arbitration in London. He nevertheless proceeded with the action behind the buyer's back and obtained judgment by default. The seller brought an action in the Court of Queen's Bench upon this judgment, and the Court of Chancery, when asked by the buyer to restrain the action, refused an injunction as being unnecessary. It was unnecessary, because the above facts, if proved, would afford a good defence to the common law action.

In Canada it has been held that a foreign judgment is re-examinable if the plaintiff fraudulently misled the foreign court into believing that he was subject to its jurisdiction.³

Foreign
court itself
fraudulent

Again, a foreign judgment has been held to be examinable where it was vitiated in the original proceedings, not by the fraud of one or both of the parties, as in the above case, but by the foreign court itself. This cannot be a matter of frequent occurrence, but it was proved to exist in *Price v. Dewhurst*,⁴ where the foreign judgment, which concerned the distribution of property, was delivered by persons who were themselves interested in the subject-matter of the suit.

So far, then, the decisions show no tendency to allow an abnormal effect to fraud when alleged as a reason for defeating a foreign judgment. There is no hint of breaking in upon the rule that such a judgment cannot be impeached on the merits.⁵ In fact, it is admitted in the latest decision on the matter that 'precisely the same tests apply whether the judgment sought to be set aside is a foreign judgment or an English judgment'.⁶ Moreover, it has been decided that, in an action brought in this country upon a foreign judgment, a commission to examine witnesses in the foreign country in aid of the defence to

¹ e.g. *Vadala v. Lawes* (1890), 25 Q.B.D. 310, 316, Lindley L.J.; *Ochsenbein v. Papelier* (1873), L.R. 8 Ch. App. 695, 700, Mellish L.J.

² (1873), L.R. 8 Ch. App. 695.

³ *Biggar v. Biggar*, [1930] 2 D.L.R. 940; cited Read, *Foreign Judgments*, p. 274.

⁴ (1837), 8 Sim. 279.

⁵ *Supra*, pp. 630 et seqq.

⁶ *Syal v. Heyward*, [1948] 2 K.B. 443, 447.

the action here will not be granted.¹ The parties have had their day in court, the facts have been investigated, and the result has been a judgment imposing an obligation upon the defendant.

'I am quite clear', said Atkin L.J. *obiter*, 'that it would not be a defence to a foreign judgment to prove that the court proceeded on the evidence of one of the parties and that the evidence could subsequently be shown to have been perjured evidence; that would be attacking the decision on its merits.'²

The view taken by the courts since 1882, however, has been that fraud is a good defence to a foreign judgment, even though its proof will necessitate the retrial of the original case on the merits³ and even though the fact of the defendant's fraud was known to the plaintiff at the time of the original trial. This puts foreign and domestic judgments on a different footing and is inconsistent with the principle that the same tests apply to both kinds of judgment. A litigant in domestic proceedings who, without being able to prove extrinsic fraud, merely alleges that owing to the fraud of his opponent the adjudicating court came to a wrong decision with regard either to the law or to the facts cannot bring an independent action to set aside the judgment, but must either take appellate proceedings or apply for a new trial; but a litigant who adopts the same line of defence can, if the original proceedings took place abroad, require the English court to try the case afresh. The result is that the doctrine as to the conclusiveness of foreign judgments is very seriously and most illogically impaired.

Alleged fraud may necessitate retrial of merits

The three decisions, all given by the Court of Appeal, which have displayed this attitude are the following:

Abouloff v. Oppenheimer.⁴

This was an action brought on a Russian judgment which ordered the return of certain goods unlawfully detained by the defendant, or alternatively, the payment of their value. One defence was that the judgment had been obtained by fraud, in that the plaintiff had falsely represented to the Russian court that the defendant was in possession of the goods, the truth being that the plaintiff himself continued in

Abouloff v. Oppenheimer

¹ *Smith v. Nicolls* (1830), 3 Sim. 458.

² *Jacobson v. Frachon* (1928), 138 L.T. 386, 394. He went on to say that it would be different if the plaintiff had procured a perjured or an unreliable witness. See *Baker v. Wadsworth* (1898), 67 L.J. (Q.B.) 301.

³ *Abouloff v. Oppenheimer* (1882), 10 Q.B.D. 295; *Vadala v. Lawes* (1890), 25 Q.B.D. 310; *Syal v. Heyward*, [1948] 2 K.B. 443.

⁴ (1882), 10 Q.B.D. 295.

possession of them throughout. It was demurred that this was an insufficient answer in point of law, since the plea was one which the Russian court could, and as a matter of fact did, consider, and that to examine it again would mean a new trial on the merits. The demurrer was overruled.¹

Vadala v. Lawes. The facts of the next case, *Vadala v. Lawes*,² were as follows:

The plaintiff sued the defendant in Italy for the non-payment of certain bills of exchange which had been accepted by the defendants' agent acting under a power of attorney. The principal defence raised in the action was that the bills, which purported to be ordinary commercial bills, were given in respect of gambling transactions without the defendant's authority. The defence was tried on its merits by the Italian court, but failed, and judgment was entered for the plaintiff. The plaintiff then brought an action in England on the judgment.

The case thus raised the simple point whether an allegation of fraud, a matter which has already been fully investigated by a foreign court, can once more be investigated in England. The Court of Appeal unanimously answered the question in the affirmative, and ordered a new trial with a view to discovering whether the bills were given for genuine mercantile dealings or for gambling transactions. Lindley L.J. said:³

'If the fraud upon the foreign court consists in the fact that the plaintiff has induced that court by fraud to come to a wrong conclusion, you can reopen the whole case even although you will have in this court to go into the very facts which were investigated, and which were in issue in the foreign court. . . . The fraud practised on the court, or alleged to have been practised on the court, was the misleading of the court by evidence known by the plaintiff to be false.'

Syal v. Heyward. The latest decision of the Court of Appeal in *Syal v. Heyward*⁴ goes even further, for it allows the retrial in England notwithstanding that the plaintiff deliberately refrained from raising in the original trial the facts upon which the allegation of fraud is based. The strange result appears to follow that an English defendant to a foreign action may reserve a defence of fraud available to him with the intention of raising it if he is sued on the judgment in England.⁵ Thus, as has been well observed, the irrational rule is suggested that:

'To disturb an *English* judgment allegations of fraud must be based

¹ It should be noticed, of course, that by demurring to the plea the plaintiff admitted the truth of the facts it alleged. ² (1890), 25 Q.B.D. 310.

³ At pp. 316-17. ⁴ [1948] 2 K.B. 443. ⁵ 65 L.Q.R. 84 (Cowen).

on facts subsequently discovered; whereas to re-open a *foreign* judgment on this ground no such limitation of time is imposed. Such a distinction suffers from the defects both of its inherent absurdity and of being completely inconsistent with the proposition, which the court accepted, that the same principles apply in respect of both English and foreign judgments.¹

An attempt to expose more fully the inconvenience and injustice of the rule thus laid down from time to time by the Court of Appeal was made in the first edition of this book,² but to reiterate it now is perhaps of little more value than to plough the sands. It is comparatively safe to prophesy that even the House of Lords will hesitate to overrule decisions that have now stood for nearly fifty years. It is pertinent, however, to remark that the view taken by the English courts has been decisively rejected in Canada.³

Present
rule un-
sound but
probably
binding

(ii) *Foreign judgment contrary to public policy of English law.*

No action is sustainable upon a foreign judgment which is contrary to the English principles of distinctive policy⁴ or which has been given in proceedings of a penal or revenue nature.⁵ There is no need to add anything here to what has already been said about this subject,⁶ except to give one example of the application of the doctrine to the particular case of a foreign judgment. The rule of English law is that 'the general recognition of the permanent rights of illegitimate children and their spinster mothers is contrary to the established policy of this country',⁷ and therefore, where a Maltese court had adjudged a putative father liable to provide his illegitimate daughter with an alimentary allowance without any time-limit, such as minority, being imposed, it was held that no action on the judgment lay in England.⁸

A civil judgment, though combined with a penal judgment,

¹ 12 *M.L.R.* 106 (Graveson).

² pp. 521-4. See also 8 *Can. B.R.* (1930), pp. 231-7.

³ Read, *Foreign Judgments*, pp. 277-81.

⁴ *In re Macartney*, [1921] 1 Ch. 522, 527, Astbury J.; for another ground on which the action failed see *supra*, p. 627.

⁵ *Huntington v. Attrill*, [1893] A.C. 150.

⁶ *Supra*, pp. 133 et seqq.

⁷ *In re Macartney*, [1921] 1 Ch. 522, 527.

⁸ *In re Macartney*, *supra*. There were two other grounds upon which this decision was based. It is, therefore, not clear authority for the dubious view that a foreign judgment is unenforceable in England merely because the cause of action is unknown to English law; see Read, *Foreign Judgments*, pp. 293-5.

may be actionable in England as creating a separate and independent cause of action, despite the general principle¹ that penalties imposed abroad are disregarded. Thus in *Raulin v. Fischer*:²

The defendant, a young American lady, while recklessly galloping her horse in the Bois de Boulogne, ran into the plaintiff, a French officer, and seriously injured him. She was prosecuted by the State for her act of criminal negligence. By French law a person who is injured by a crime may intervene in the prosecution and make a claim for damages, whereupon his civil action is tried together with the prosecution and one judgment is pronounced on both matters. The plaintiff did so intervene. The defendant was convicted of the crime and ordered to pay a fine of 100 francs to the State and 15,917 francs by way of damages and costs to the plaintiff.

It was held on these facts, in an action brought by the plaintiff in England to recover the sterling equivalent of 15,917 francs, that the French judgment was severable. That part of it which awarded the plaintiff damages was not tainted with the penal character of the rest of the proceedings, and therefore might be put in suit in England without involving a recognition of a penal judgment.

(iii) *Foreign judgment contrary to natural justice.*

Difficulty
of defining
'natural
justice'

Although the judges have frequently asserted that a foreign judgment which contravenes the principles of natural justice cannot be enforced in England, it is extremely difficult to fix with precision the exact cases in which the contravention is sufficiently serious to justify a refusal of enforcement. Shadwell V.-C. once said that 'whenever it is manifest that justice has been disregarded, the court is bound to treat the decision as a matter of no value and no substance'.³ But this goes too far. Is, for instance, an obviously incorrect decision a disregard of natural justice? We have already seen that a foreign judgment is actionable notwithstanding that it patently proceeded upon a wrong view of the evidence or of the foreign law, or even of English law. Such a judgment is in a wide sense unjust, but it is difficult to trace delicate gradations of injustice so as to reach a definite point at which it deserves to be called the negation of natural justice. Channell J., in delivering judgment in a case

¹ *Huntington v. Attrill*, [1893] A.C. 150; *supra*, p. 136; *Banco de Vizcaya v. Don Alfonso de Borbón y Austria*, [1935] 1 K.B. 140, *supra*, p. 136.

² [1911] 2 K.B. 93.

³ *Price v. Dewhurst* (1837), 8 Sim. 279, 302.

where the defendant to an action on a Canadian judgment pleaded unsuccessfully the refusal of the Canadian court to admit evidence of a certain fraud which, had it been admitted, would indubitably have disproved his liability, said:¹

'In my view of it, the judgment appears, according to our law, to be clearly wrong, but that of course is not enough, *Godard v. Gray*;² and whatever the expression "contrary to natural justice", which is used in so many cases, means (and there really is very little authority indeed as to what it does mean), I think that it is not enough to say that a decision is very wrong, any more than it is merely to say that it is wrong. It is not enough, therefore, to say that the result works injustice in the particular case, because a wrong decision always does.'

The expression 'contrary to natural justice' has, however, figured so prominently in judicial statements that it is essential to fix, if possible, its exact scope. The only statement that can be made with any approach to accuracy is that in the present context the expression is confined to something glaringly defective in the mode of procedure of the foreign court.³ Thus, any impropriety in the foreign proceedings which has deprived a party of an opportunity to present his side of the case will be regarded as a violation of natural justice.⁴ The wholesome maxim *audi alteram partem* is deemed to be of universal, not merely of domestic, application. A departure from the maxim may appear in two forms.

Concept of
natural
justice
bound up
with
maxim *audi
alteram
partem*

First, where the litigant received no adequate notice of the foreign proceedings. What is adequate must be measured according to the standard of fairness recognized by English law.⁵ The mere fact that the length of notice fell short of that required by the procedural code in the country of adjudication does not necessarily violate English views of substantial justice. The injustice must be something more than a mere irregularity of procedure. The defendant must show that he was ignorant of the proceedings or that he was not given a reasonable opportunity to appear.⁶

No notice
of pro-
ceedings

¹ *Robinson v. Fenner*, [1913] 3 K.B. 835, 842.

² (1870), L.R. 6 Q.B. 139; *supra*, p. 632.

³ See the judgment of Bramwell B. in *Crawley v. Isaacs* (1867), 16 L.T. 529. For a full review of the subject see Piggott, *Foreign Judgments* (2nd ed.), pp. 167-74.

⁴ *Jacobson v. Frachon* (1928), 138 L.T. 386, 390 (Lord Hanworth), 392 (Atkin L.J.); *Buchanan v. Rucker* (1808), 9 East 192; *Rudd v. Rudd*, [1924] P. 72.

⁵ See Read, *Foreign Judgments*, p. 285.

⁶ *Pemberton v. Hughes*, [1899] 1 Ch. 781, 790-1, 792-3, 796-7. Cp. the analogous situation where the question is whether the defendant had adequate

Thus in *Rudd v. Rudd*,¹ where a husband purported to notify his wife of divorce proceedings which he initiated against her in Washington State, U.S.A., by posting a copy of the complaint to an English address at which she had never lived, and by advertising the proceedings in the *Seattle Weekly News* which she was not in the habit of reading, Horridge J. held that the subsequent decree of the American court was void, since it was pronounced in the absence and without the knowledge of the wife. The plea that no notice has been received will not, however, avail a party who has agreed, either expressly or implicitly, to be content with something less than actual notice in fact, e.g. where a person buys shares in a foreign company whose articles of association provide that the directors may notify shareholders of proceedings by lodging notices at some particular place.²

It is significant that the Foreign Judgments (Reciprocal Enforcement) Act, 1933, in specifying what judgments shall be incapable of registration, does not mention the requirement of natural justice, but does insist that sufficient notice of the proceedings should have been received by the defendant.³

Unfairly prejudiced in foreign proceedings Secondly, it is a violation of natural justice if a litigant, though present at the proceedings, was unfairly prejudiced in the presentation of his case to the court. A clear example of this would be if he were totally denied a right to plead, but the defence of unfair prejudice is not one that is lightly admitted. It is not sufficient, for instance, that his personal evidence was excluded, if the procedural rule of the forum is that parties may not give evidence on their own behalf.⁴ Again, the defence will not succeed if the alleged unfairness consisted of something that might have been combated and removed in the foreign action. The question whether this was the true position arose in *Jacobson v. Frachon*,⁵ where the facts were as follows:

A & Co. of London agreed to buy crêpe de Chine from *B* of Lyons.

A & Co. brought an action in France for cancellation of the contract

notice of English proceedings: *Luccioni v. Luccioni*, [1943] P. 49; *Weighman v. Weighman*, [1947] 2 All E.R. 852.

¹ [1924] P. 72; distinguish *Vardy v. Smith* (1932), 48 T.L.R. 661; 49 T.L.R. 36. In *Rudd v. Rudd* an additional ground of invalidity was the uncertainty whether the husband had acquired a domicile in Washington State. Distinguish also *Boettcher v. Boettcher*, [1949] W.N. 83; 93 Sol. Jo. 237.

² *Vallée v. Dumergue* (1849), 4 Ex. 290; *Copin v. Adamson* (1874), L.R. 9 Ex. 345; *supra*, p. 612.

³ *Supra*, p. 602.

⁴ *Scarpetta v. Lowensfeld* (1911), 27 T.L.R. 509; *Robinson v. Fenner*, [1913] 3 K.B. 835.

⁵ (1928), 138 T.L. 386.

and for damages, on the ground that deliveries of the material were short in quantity and inferior in quality. The French court, before giving judgment, appointed an expert to examine the material in London. The expert, who was a relative of *B*, made no proper examination, and, though deputed by the court to take evidence, refused to hear the evidence of *A & Co.* and their witnesses. He ultimately made a report adverse to *A & Co.* which was found by Roche J. to be the uncandid production of a biased and prejudiced mind. Judgment for *B* was given by the French court. *A & Co.* then sued *B* in England for breach of the original contract. *B* pleaded the French judgment in bar of the action, but *A & Co.* replied that this judgment was contrary to natural justice.

The Court of Appeal held that the judgment was not void as contravening the requirements of natural justice, since *A & Co.* had not been prevented from presenting their case to the court. It appeared that by French law the court was not bound by the expert's report, but could reject it if satisfied of its inaccuracy. *A & Co.* therefore were at liberty to produce witnesses to the court and to attack the report. It further appeared that *A & Co.* had taken this course, though without success. It could not, therefore, be said that the court had refused to hear the evidence of the litigant.

PART VII
PROCEDURE

CHAPTER XVIII

PROCEDURE

I. Difference between substance and procedure. *Pages 649-53.*

II. Matters appertaining to procedure. *Pages 653-77.*

(a) The time within which an action must be brought. *Pages 653-7.*

(b) The mode in which an action must be brought. *Pages 657-67.*

(c) The nature and extent of the remedy. *Pages 667-76.*

(d) Execution. *Pages 676-7.*

I. DIFFERENCE BETWEEN SUBSTANCE AND PROCEDURE

ONE of the eternal verities of every system of private international law is that a distinction must be made between substance and procedure, between right and remedy. The substantive rights of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the *lex fori*.¹ In a case where the issue was the liability of the defendant upon a promissory note made in France, Tindal C.J. stated the principle and the distinction that it causes as follows:

“The distinction between that part of the law of the foreign country where a personal contract is made which is adopted, and that which is not adopted by our English courts of law, is well known and established; namely, that so much of the law as affects the rights and merits of the contract, all that relates *ad litus decisionem*, is adopted from the foreign country; so much of the law as affects the remedy only, all that relates *ad litus ordinationem*, is taken from the law of the country where the action is brought.”²

At first sight the principle seems almost self-evident. A person who resorts to an English court for the purpose of enforcing a claim that arose abroad cannot expect to occupy a different procedural position from that of a domestic litigant.

Justification of the rule

¹ *British Linen Co. v. Drummond* (1830), 10 B. & C. 903; *De la Vega v. Vianna* (1830), 1 B. & Ad. 284; *Huber v. Steiner* (1835), 2 Bing. N.C. 202; *Don v. Lippmann* (1837), 5 Cl. & F. 1, 13; *Melan v. The Duke de Fitzjames* (1797), 1 B. & P. 138, 142, per Heath J. *diss.*; Story, s. 556; Westlake, s. 341; Dicey, p. 859; Foote, p. 542. For the history of the principle see 39 *Michigan Law Review*, 396 et seqq. (E. H. Ailes). On the subject generally see Falconbridge, *Conflict of Laws* (2nd ed.), pp. 301 et seqq., and see articles there cited at p. 301 note (a).

² *Huber v. Steiner*, *supra*, at p. 210.

The department of procedure constitutes perhaps the most technical part of any legal system, and it comprises rules many of which would be unintelligible to a foreign judge and certainly unworkable by a machinery designed on different lines. A person suing in England must take the law of procedure as he finds it. He cannot by virtue of some rule in his own country enjoy greater advantages than other suitors here; neither must he be deprived of any advantages which English law may confer upon a litigant in the particular form of action.¹ An English creditor who sues his debtor in Scotland cannot insist upon a trial by jury, nor, in the converse case, can a Scottish creditor suing in England refuse the intervention of a jury, on the ground that in Scotland, where the debt arose, the case would be tried by a judge alone.²

Importance
of dis-
tinguishing
substance
from pro-
cedure

Certain and universal though the principle is, however, its application is frequently one of considerable difficulty, for by what test is a procedural rule to be distinguished from one of substantive law?³ Unless the distinction is made with a sagacious regard to the underlying purpose of private international law, the inevitable result will be to defeat that purpose. So intimate is the connexion between substance and procedure, that to treat an English rule as procedural may defeat the policy which demands the application of a foreign substantive law. A glaring example of this is afforded by the fourth section of the Statute of Frauds which provides that no action shall be brought upon certain contracts unless they are evidenced by a note or memorandum signed by the party to be charged or by his agent thereunto lawfully authorized. In *Leroux v. Brown*:⁴

An oral agreement was made in France by which the defendant, resident in England, agreed to employ the plaintiff, resident in France, for a period that was longer than a year. The contract was valid by French law, which was the proper law, but had it been an English domestic contract it would have been unenforceable under the Statute of Frauds. An action brought in England for its breach failed on the ground that the statute imposes a rule of procedure which is binding on all litigants suing in England.

A moment's reflection will show that this decision, though possibly based upon an intelligible principle of domestic law, is repugnant to the principles upon which English private inter-

¹ *De la Vega v. Vianna*, *supra*, at p. 288, *per* Lord Tenterden.

² *Don v. Lippmann*, *supra*, at p. 14, *per* Lord Brougham.

³ See Paton, *Jurisprudence*, pp. 433 et seqq.

⁴ [1852] 12 C.B. 801; and see *Morris v. Baron*, [1918] A.C. 1, 15.

national law is founded. That law exists to fulfil foreign rights, not to destroy them. The proper law of the contract in *Leroux v. Brown* undoubtedly entitled the plaintiff to recover damages for the breach of the undertaking, and had he obtained judgment in France in an action to which the defendant voluntarily appeared, nothing would have prevented him from succeeding in a suit brought upon the judgment in England. To refuse him a right of action in England on the contract was tantamount to denying that the contract, admittedly governed as to substance by French law, conferred a right upon him. It is a stultification of private international law to refuse recognition to a foreign right substantively valid under its *lex causae*, unless its recognition will conflict with some rule of public policy so insistent as to override all other considerations. That learned judge Willes J. attacked the decision in two later cases, and was evidently of opinion that in the circumstances the statutory rule should not have been treated as procedural.¹

The question remains, then, how the line between substance and procedure is to be drawn for the purposes of private international law. Only the most general definitions of 'the law of procedure' have been given by the English judges. Perhaps the best known is that of Lush L.J.:

How is the distinction to be made?

'The mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer; the machinery as distinguished from the product.'²

This substitution of 'mode of proceeding' for 'procedure' does not carry us far. Nor does the definition ensure a just and convenient solution. It implies that since the owner has chosen to fashion his foreign-acquired right into a new form through the instrumentality of English machinery he must rest content with the design and movement of that machine. This sounds sensible, but if as in *Leroux v. Brown* the machinery refuses to move, one part of private international law is incontinently

¹ *Williams v. Wheeler* (1860), 8 C.B. (N.S.) 299, 316; *Gibson v. Holland* (1865), L.R. 1 C.P. 1, 8. See Williston on *Contracts*, i, s. 600; 32 *Yale Law Journal*, 311 (Lorenzen). Rules analogous to that contained in the Statute of Frauds are found on the Continent. For example, by French law a notarial or a written contract is required for a contract concerning an object valued at more than 500 francs; Wolff, pp. 230-1. The Continental view is that this is a substantive rule to be applied only if it is part of the proper law of the contract; *Benton v. Horeau* (Clunet, 1880, p. 480), cited 15 *H.T.B.I.L.* (1934), 29.

² *Poyser v. Minors* (1881), 7 Q.B.D. 329, 333; adopted in *Shoesmith v. Lancashire Mental Hospital*, [1938] 3 All E.R. 186.

nullified by another. Nor shall we arrive at a solution if we change the metaphor and concentrate upon the contrast between right and remedy. They do not always admit of contrast in law. Historically they are inseparably connected. Much of substantive law is secreted in the interstices of procedure,¹ and a great American has said that 'wherever we trace a leading doctrine of substantive law far enough back, we are likely to find some forgotten circumstance of procedure at its source'.² Moreover, it is still true that certain rules which on the surface appear merely to affect remedies are in fact rules of substance, not of procedure.³

No innate
distinction
between
substance
and pro-
cedure

Governing
factor is the
purpose for
which the
distinction
is required

The truth is, as an American jurist has so convincingly shown, that substance and procedure cannot be relegated to clear-cut categories.⁴ There is no preordained dividing line between the two, having some kind of objective existence discoverable by logic. What is procedural, what substantive, cannot be determined *in vacuo*.⁵ A line between the two must, of course, be drawn, but in deciding where to draw it we must have regard to the relativity of legal terms and must realize the exact purpose for which we are making the distinction. The line should not be drawn in the same place for all purposes.⁶ It should be drawn in the light of the relevant circumstances, one of which is that the purposes of private international law as distinct from municipal law require fulfilment. Thus it is at least arguable that whether the fourth section of the Statute of Frauds is of a procedural or a substantive nature should be decided differently according as a foreign or a purely English transaction is involved. The crux of the matter is—Why is the distinction between substance and procedure made in private international law? The answer presumably is—For the convenience of the court. The court, when seised of a 'conflict of laws' problem, though bound to apply the *lex causae*, cannot be expected to import all the relevant rules of the foreign law. To apply, for instance, the foreign rules concerned with such matters as service of process, evidence and methods of enforcing judgments would be not only inconvenient but impracticable. Nevertheless, the overriding policy is to apply the

¹ Maine, *Early Law and Custom*, p. 389.

² Holmes, *The Common Law*, p. 253. For a collection of similar statements see 39 *Michigan Law Review*, 401-2, note 36.

³ Salmond, *Jurisprudence* (10th ed.), sec. 175.

⁴ Cook, *Logical and Legal Basis of Conflict of Laws*, chap. vi, pp. 154 et seqq.

⁵ *Ibid.*, p. 189.

⁶ *Ibid.*, *passim*.

foreign substantive law, and if this will be defeated by a slavish adherence to the domestic distinction between substance and procedure, it behoves the court to consider whether in the circumstances such adherence is necessary.

'If we admit', says Cook, 'that the "substantive" shades off by imperceptible degrees into the "procedural", and that the "line" between them does not "exist", to be discovered merely by logic and analysis, but is rather to be drawn so as best to carry out our purpose, we see that our problem resolves itself substantially into this: How far can the court of the *forum* go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?'

One critic has replied, 'Not much farther than we have already gone';² but at least it would be possible to go far enough to avoid such decisions as *Leroux v. Brown*³ and some of those concerned with statutes of limitation.

The principal rules that, rightly or wrongly, have been classified as procedural will now be considered in detail.

II. MATTERS APPERTAINING TO PROCEDURE

(a) *The time within which an action must be brought.*

English law is unfortunately committed to the view that statutes of limitation, if they merely specify a certain time after which rights cannot be enforced by action, affect procedure, not substance. They concern, it is said, not the merits of the cause, but the manner in which the remedy must be pursued. They ordain that procedure is available only when set in motion within a certain fixed time after the cause of action arose. In the result, therefore, any relevant statute of limitation that obtains in the *lex fori* may be pleaded, while a statute of some foreign law, even though it belongs to the proper law of the transaction, must be disregarded. The prevailing view on the Continent is to the opposite effect.⁴

This is another example where English law, through its failure to interpret a foreign rule in its context,⁵ has gone astray.⁶

Suppose, for instance, that an action brought in England upon a German contract is barred by the German statutes but is still maintainable according to English law.

¹ Cook, *Logical and Legal Basis of Conflict of Laws*, p. 166.

² E. H. Ailes, 39 *Michigan Law Review*, 418.

³ *Supra*, p. 650.

⁴ See 28 *Y.L.J.* 492; 31 *Michigan Law Review*, 474; 21 *Can. B.R.* 786.

⁵ *Supra*, p. 56.

⁶ Wolff, p. 232.

English
view of
statutes of
limitation

Unsatis-
factory
nature of
English
view

The correct course in such a case is to ascertain whether the foreign statute is classified by German law, which is the proper law of the contract, as substantial or procedural. If in the eyes of German law it affects substance, it should be regarded as operative in England; but if it affects procedure it must stand excluded. To allow the action to proceed merely because it is in time according to the statutes of the forum, which is what the English courts do, is to allow a remedy which is no longer available under the law that governs the substance of the transaction concerned. That law should govern the annihilation of the right of action as well as its creation.

The rules of English private international law upon this matter, however, pay little attention to the proper law of the transaction that is in issue. Thus in a report of a judgment by Roche J. it is said: 'Foreign courts might have decided that the laws of limitation were part of the substantive law, but he was unable to apply them as such'.¹ The result of this attitude is twofold.

English statute exclusively applicable in England First, an English statute of limitation is a good plea to an action brought in England, notwithstanding that the action is still maintainable according to the proper law of the transaction.²

Thus in *British Linen Company v. Drummond*,³ the English period of six years was applied to an action on a Scottish contract, although the time within which the action might have been brought in Scotland was forty years.

Foreign statute not applicable in England Secondly, the extinction of the right of action by the proper law of the transaction is not a bar to an action in England. In other words, if the permissible period is longer in England than in the foreign country the plaintiff is at liberty to sustain his action here.⁴ Moreover, this is so, even though the foreign court has already adjudged the action to be barred in its own country. In *Harris v. Quine*:⁵

Harris v. Quine The plaintiffs, attorneys in the Isle of Man, were employed by the defendant from 1858 to 1 October 1862, in conducting actions on his behalf in the island. In an action for recovery of fees brought by

¹ *Société de Prayon v. Koppel*, *The Times* newspaper, 2 Nov. 1933.

² *British Linen Co. v. Drummond* (1830), 10 B. & C. 903; *Don v. Lippmann* (1837), 5 Cl. & F. 1.

³ *Supra*.

⁴ *Harris v. Quine* (1869), L.R. 4 Q.B. 653; *Huber v. Steiner* (1835), 2 Bing. N.C. 202; *Alliance Bank of Simla v. Carey* (1880), 5 C.P.D. 429.

⁵ *Supra*.

the plaintiffs in the Manx court on 30 October 1865, judgment was given for the defendant, on the ground that by the Manx statute the suit should have been instituted within three years of the cause of action. To an action brought by the plaintiffs in England for the recovery of the same amount, the defendant pleaded the judgment of the Manx court.

The plea failed and judgment was given for the plaintiffs. Presumably the plea of *res judicata* failed on the ground that there had been no adjudication in the Isle of Man upon the existence of the substantive right.

So far we have dealt only with statutes of limitation strictly so called, i.e. those which merely fix the period within which the remedy must be pursued. If they are of a different nature, that is to say, if they not only bar the remedy but extinguish altogether the claim or cause of action, then English courts are prepared to give effect to the proper law of the transaction. The prevailing opinion is that a statute of this description, if part of the proper law of the transaction, may be successfully pleaded in any other country where the cause of action is put in suit.¹ Thus in *Harris v. Quine*² Blackburn J. said:

Different position of statutes which extinguish the right

‘If the plaintiffs could have shown that the law of the Isle of Man extinguished the right as well as the remedy, and this had been the issue determined by the Manx court, that would have been a different matter.’

This distinction is analogous to that which obtains in the civil law, namely, between positive or acquisitive prescription (the Roman *usucapio*), which is the acquisition of ownership by long-continued possession, and negative or extinctive prescription, which neither destroys nor transfers to a new owner an existing right, but provides that the right cannot be put in suit after the lapse of a certain period. The English Limitation Act destroys, sometimes the right, sometimes merely the remedy.

A statute which ordains that actual ownership shall be obtained by long-continued possession goes to the substance of a transaction, and must be recognized by a foreign *lex fori*. Though statutes of limitation of this nature generally concern land,³ they may refer to movables.

Extinction of right to property

Thus in *Shelby v. Guy*,⁴ in the Supreme Court of the United States, it appeared that by the law of Virginia five years’ bona fide possession of a slave created a title upon which the possessor could recover in detinue.

¹ Story, s. 582.

² (1869), L.R. 4 Q.B. 653.

³ *Beckford v. Wade* (1805), 17 Ves. Jun. 87.

⁴ 11 Wheaton 361.

It was accordingly held that a person who had bought a slave in Virginia from one who had been in possession for longer than five years could successfully set up the title thus acquired under the *lex loci* as a defence to an action brought against him in Tennessee.

The rule of English law until recently was that adverse possession of personal chattels did not extinguish the title of the owner, but merely barred his remedy. The Limitation Act, 1939, however, now provides that where a cause of action in trover or detinue has accrued to a person his title to the chattels shall be extinguished after the lapse of six years from the time of accrual.¹ When the issue concerns an obligation, as distinct from property in the tangible sense,² the question whether a foreign statute must be recognized in an English action depends solely upon whether the statute extinguishes not merely the right of action, but the right itself—whether, in other words, it declares the right to be non-existent. This issue arose in *Huber v. Steiner*,³ where a promissory note had been made in France by the defendant to the order of the plaintiff, both parties at the time being resident and domiciled in that country. To an action brought on the note in England, the defendant pleaded the French law of prescription, which provided that:

All actions relative to letters of exchange and to bills to order . . . *prescribe themselves* by five years, reckoning from the day of protest or from the last suing out of any judicial process. . . .

Tindal C.J. in delivering judgment said that it was necessary to consider

Judgment of Tindal C.J. in *Huber v. Steiner* 'Whether, by the law of France, the contract made by the defendant in his promissory note is altogether extinguished and made null and void in that country; or whether, under the doctrine of prescription, the contract itself is not annulled and extinguished, but the remedy only barred in the French courts of law.'

In the former case, the French rule would remain operative; in the latter, it would form no bar to an action in the English courts. The learned judge, having examined the wording of the French enactment, came to the clear conclusion that it contemplated only a limitation of the remedy and not an utter avoidance of the contract itself. It is doubtful, however, whether the

¹ S. 3 (1), (2).

² Westlake, p. 327, contends that prescription in the strict sense cannot apply to obligations.

³ (1835), 2 Bing. N.C. 203. And see *Société de Prayon v. Koppel*, *The Times* newspaper, 2 Nov. 1933, cited and explained in 15 *B.Y.B.I.L.* (1934), 75.

correct test was applied in the classification of the French rule.¹

(b) *The mode in which an action must be brought.*

Authority is scarcely needed for the proposition that all routine matters arising in the successive stages of litigation must be governed exclusively by English law as being the *lex fori*. It is generally said that these include: service of process;² the form that the action must take, e.g. whether it should be an action at common law or a suit in equity, or whether any special procedure is permissible; the title of the action, e.g. by what persons and against what persons it should be brought; the competency of witnesses and questions as to the admissibility of evidence; the respective functions of judge and jury; the right of appeal, and, according to some writers, the burden of proof.

Mode of
proceedings
governed
by *lex fori*

Of these examples the three matters of burden of proof, evidence, and appropriate parties call for special examination.

A controversial question is whether presumptions and burden of proof are matters that affect procedure or substance.³

Burden of
proof

By English law, for instance, there is a presumption that a wife is entitled to pledge her husband's credit for household necessities which are suitable to his style of living. The burden lies on the husband to rebut the presumption, which he may do in a variety of ways, as, for instance, by proving that at the time of the purchase he was sufficiently supplied with articles of the kind bought. Suppose that by the law of country *X* a husband is liable for household necessities bought by his wife, but that it lies upon the seller to prove that her supply was insufficient at the time of the contract. Suppose further that a purchase of necessities has been made in *X*, with which country the three parties are connected by nationality, domicile and residence.

If the tradesman sues the husband in England for the price of the goods, is it for him to prove in accordance with the law of *X* that the goods were necessary in the strict sense, or is it for the husband to prove that they were not needed? Upon the ruling given to this problem may depend the result of the case. It is submitted that the law of *X* applies, upon the ground that the facts to be proved and the obstacles to be overcome by a plaintiff before he establishes his cause of action affect essentially the substance of his right. It is reasonably clear in the

¹ 15 *B.Y.B.I.L.* 67-68; 75-76.

² *Dobson v. Festi, Rasini & Co.*, [1891] 2 Q.B. 92.

³ See Wolff, pp. 234-6.

hypothetical case just given that the content of the tradesman's substantive right varies according as it is tested by the law of *X* or by English law. In the one case his right is to recover only if he proves a certain fact, in the other he has an absolute right of recovery unless that fact is disproved by his opponent. It is impossible to describe the exact nature and extent of his right without taking this circumstance into account. To establish his cause of action, which is a matter of substantive law, he must prove that at the time of the contract the husband was insufficiently provided with the class of goods supplied.¹

This view, that the burden of proof is regulated by the *lex causae*, has the support of Uthwatt J. in *In re Cohn*,² but the contrary view was voiced by Langton J. in *The Roberta*.³

Burden of
proof in
contribu-
tory negli-
gence

The question whether a rule distributing the burden of proof affects substance or procedure has frequently arisen in the United States of America upon a plea of contributory negligence. The general rule as to tortious liability recognized by the State courts is that the *lex loci delicti* determines whether a right of action exists. It is that *lex* which constitutes the substantive law. But in some States the burden of proving contributory negligence lies upon the defendant, in others it is for the plaintiff to prove affirmatively that he was personally free from negligence. It may, therefore, become necessary to decide whether such a rule is procedural or not when an action is brought in one State in respect of an injury caused in another. The decisions are not in agreement, but there is respectable authority for the view that the burden of proving contributory negligence is determined by the law of the place where the injury was committed, in other words that the question is one of substantive law.⁴

Evidence a
matter for
lex fori

Every system of law has its own principles for determining the manner in which the truth of facts, acts and documents shall be ascertained, and it is obvious that whether the question at issue is domestic or foreign in origin, those principles must

¹ The presumptions in the hypothetical case would seem to be what a distinguished writer has called 'compelling presumptions', 61 *L.Q.R.* 380. Wolff, p. 235, points out that 'those Continental legislators who have made two separate codes, a civil code and a code of civil procedure, have placed all these rules in their civil codes'.

² [1945] 1 Ch. 5.

³ (1937), 58 *LL. L.Rep.* 159.

⁴ See, for example, *Fitzpatrick v. International Railway* (1929), 252 N.Y. 127; Lorenzen, p. 371; dist. *Sampson v. Channell* (1940), 110 F. 754; Cheetham, p. 541; see generally Hancock, *Torts in the Conflict of Laws*, pp. 159 et seqq.; Goodrich, pp. 238-9.

invariably apply. If another system of evidence were admissible it would be equally reasonable to permit another mode of trial.¹

‘Whether a witness is competent or not,’ said Lord Brougham, ‘whether a certain matter requires to be proved by writing or not, whether certain evidence proves a certain fact or not, that is to be determined by the law of the country where the question arises.’²

*Leroux v. Brown*³ is an outstanding example of the rule that the *lex fori* determines whether written evidence is required.

With regard to the evidence necessary to prove a certain fact, an important distinction that exists where the *causa probanda* is a document must be noted. The interpretation of the document must be distinguished from its proof. The foreign document must be interpreted according to the system of law by which it is governed (e.g. according to the proper law in the case of a written contract), but it must be proved in accordance with the requirements of the *lex fori*. The English court that is seised of the matter must investigate the governing law as a fact and must take such expert evidence as shows what the construction would be in the foreign country, but at that point the reference to the foreign law must stop. What evidence that law admits, what it rejects, is irrelevant.⁴ Thus, for example, the meaning of technical expressions used in a charter-party must be ascertained by reference to the proper law, but the existence of the charter-party itself must be proved in the manner required by English law. Thus in *Brown v. Thornton*:⁵

Distinction
between
interpreta-
tion and
proof of
document

An action was brought in England to recover freight due under a charter-party that had been made in Batavia. It was found that charter-parties were made in Batavia by the instrument being written in the book of a notary, and then signed by the parties. Each party received a copy signed and sealed by the notary and counter-signed by the principal officer of the Government of Java. A charter-party was sufficiently proved in a Javanese court by production of the notary's book, but, since such books were not allowed to be removed from Java, courts in other parts of Dutch dominions admitted the copies as evidence.

The plaintiff was nonsuited owing to his failure to prove the charter-party in the manner required by English law. The original contract contained in the notary's book was not produced. Secondary evidence would have been admissible had

¹ *Yates v. Thompson* (1835), 3 Cl. & F. 544, 587, *per* Lord Brougham.

² *Bain v. Whitehaven Ry. Co.* (1850), 3 H.L.C. 1, 19.

³ *Supra*, p. 650.

⁴ *Yates v. Thompson*, *supra*, at p. 586, *per* Lord Brougham.

⁵ (1837), 6 Ad. & E. 185.

it been given in the form either of a copy made by the public officer of a court or of a copy made by some person authorized by each party to give a binding copy, but neither of these ways was available. The decision, however, might have been different had it appeared that the copies were taken at the time when the original contract was made and in the presence of the parties, for in such an event it would have been arguable that the notary was an agent authorized by both parties to give a binding copy.

Evidence Act, 1933 The Crown, however, now has power under the Evidence (Foreign Dominion and Colonial Documents) Act, 1933, to issue Orders in Council providing that entries contained in the public registries of other countries, whether part of the British Commonwealth or not, shall be admissible evidence in English proceedings, and that they shall be proved by means of duly authenticated official certificates. An Order in Council, however, will not be made unless the foreign country in question recognizes the public registers of the United Kingdom and admits proof of the registered contents by means of duly authenticated certificates issued by public officers in the United Kingdom.¹

Interpretation distinguished from evidence Evidence, however, must be distinguished from interpretation. The rule of English law, for instance, that if a contract is written, 'the writing is the grand criterion of what terms are intended to be contractual and what not'² and that therefore oral evidence is inadmissible to add to, vary or contradict the writing, is a rule of evidence properly so called that must be applied in every English action.³ But, despite its deceptive similarity, the rule which admits oral evidence to show that the parties intended to incorporate a certain condition customarily included in a contract of the particular kind is a rule of interpretation that is not necessarily applicable merely because the action is in England. It concerns interpretation, not proof.⁴ Owing to the imperfect manner in which the contract has been drafted, the intention of the parties is not clear and the object of the particular rule is to explain what they meant.⁵

¹ Orders have already been made in respect to Belgium (S.R. & O. 1933, No. 383), France (S.R. & O. 1937, No. 515), and Australia (S.R. & O. 1938, No. 739). See *North v. North* (1936), 52 T.L.R. 380; *Motture v. Motture*, [1955] 1 W.L.R. 1066 and the Practice Note in [1955] 1 W.L.R. 668.

² *Korner v. Witkowitz*, [1950] 2 K.B. 128, 162, per Denning L.J.

³ *Ibid.* at pp. 162-3.

⁴ *Ibid.* at p. 163.

⁵ The different nature of the two rules is illustrated and explained in Stephen, *Digest of the Law of Evidence* (12th ed.), notes xiv and xv to articles 97 and 98.

A distinction must also be made between facts that are relevant and the evidence by which such facts are proved, for the former fall to be decided according to the proper law of the transaction, while the latter is a matter of procedure for the *lex fori*. This was considered in *The Gaetano and Maria*.¹

Distinction
between
proof and
facts to be
proved

An action was brought in England on a bottomry bond given at the Azores by the master of a ship carrying the Italian flag, without any communication with his owners. By Italian law the bond was valid, by English law its validity depended upon proof that at the time it was given the ship was in necessity and that the circumstances were such as to render it impossible for the master to communicate with the cargo-owners. It was accordingly argued that, since proof of necessity is a matter of evidence, the question of the validity of the bond must be determined by English law as being the *lex fori*. The flaw in this argument was exposed by the Court of Appeal.

The sole fact in issue was one of substance, namely whether the master had authority to give a valid bond, a question which fell to be determined by Italian law as being the law of the flag. The equivalent English rule on this question no doubt differed from that obtaining in Italy, but since it affected substance, not procedure, it was not to be invoked merely because the action was in England. The converse position occurred in the American case of *Hoadley v. Northern Transportation Co.*,² where the facts were these:

Upon a contract for the shipment of goods being made in Illinois, the defendants, common carriers, gave the plaintiff shipper a bill of lading which contained a clause exempting the defendants from all liability for loss of property by fire while in transit or in a warehouse. The goods were destroyed at Chicago in the great fire of 1871. By the law of Illinois, and also of Massachusetts where the action was brought, a common carrier was permitted to avoid his liability at common law by a special contract. By the law of Illinois, however, such a contract did not bind a shipper unless he had assented to its terms, and assent was not presumed from mere receipt of the bill of lading but had to be proved by other and additional evidence. By the law of Massachusetts acceptance of the bill of lading was in itself sufficient evidence of assent.

The question in the Massachusetts action was whether this rule of Illinois law applied. Did that rule affect the remedy upon the contract or its validity? It is clear that the fact to be proved, no

matter where the action was brought, was whether a special contract had been made. What the Illinois rule ordained was that if action were brought that fact must be proved by certain evidence, just as the Statute of Frauds requires that a contract of guarantee put in suit in England must be proved by written evidence. It was held, therefore, that the rule affected procedure and was of no force in Massachusetts.

Form of proceeding governed by *lex fori* It is not a valid objection to an action instituted in England in the correct form that the form would necessarily have been different had proceedings been instituted in the courts of the proper law of the transaction.¹ The form in which a remedy must be pursued goes to procedure. In effect, differences of form are concerned with the identity of the parties to the action, and in this connexion there are two questions to be considered.

Question who is the correct person to sue generally said to be a matter for *lex fori* The first is, whether the name in which an action may be brought falls to be determined exclusively by the *lex fori*, on the ground that it is a mere matter of procedure. It is a question that arises principally where the plaintiff is not the original owner of the subject-matter of the dispute, but has acquired it derivatively from the original owner, as, for instance, in the case of the assignment of a debt or other *chose in action*. In those cases where English law requires the assignee to sue in the name of the assignor, it has been said,² and indeed on one occasion held,³ that the requirement must be observed in an action in this country, even though it is not necessary by the proper law of the transaction. In the present state of English law this ruling causes no hardship, since, even where the assignment is purely equitable, the plaintiff can overcome the difficulty by joining the assignor as defendant, provided that he still has a *de jure* existence.⁴

But on principle it is doubtful whether every rule that regulates the name in which an action must be brought is merely procedural in character. It would seem to be an unwarranted extension of the province of procedure, at any rate in cases falling within the sphere of private international law, to regard a rule as procedural if the effect is to deprive the plaintiff of a right which he has definitely acquired under the governing legal system. If, for instance, English law still regarded a contractual right as so essentially personal as to be actionable

¹ *General Steam Navigation Co. v. Guillon* (1843), 11 M. & W. 877, 895.

² *Wolff v. Oxholm* (1817), 6 M. & S. 92, 99, *per* Lord Ellenborough.

³ *Jeffery v. McTaggart* (1817), 6 M. & S. 126.

⁴ See the Russian Bank cases, *supra*, pp. 486 et seqq.

only at the suit of the original contracting party, it would surely be the negation of principle, and indeed of justice, to enforce such a rule indiscriminately as being one of procedure, and thus to defeat a plaintiff who had acquired a contractual right derivatively under some legal system which regarded the transaction as valid. To adopt this attitude would be to mistake substance for procedure. There is little authority on the matter, but the early case of *O'Callaghan v. Thomand*¹ at least shows that the English courts have not always adopted this attitude.

The assignee of an Irish judgment brought an action of debt in his own name in England to recover the amount of the judgment. He was entitled so to sue by Irish law.

The argument of counsel for defendant was instructive. Though admitting the general principle that the law of one country would recognize and enforce obligations raised by the law of another country, he contended that the principle applied only to the substance of the contract, and could neither transfer to another country the form of enforcing an obligation nor be allowed to contravene the general rule of English law that *choses in action* were unassignable. He therefore argued that no action could be maintained in the present circumstances except in the name of the person who recovered the judgment. The court, however, was unanimous that the rule was matter of substance, not of procedure. The same result was reached in the earlier case of *Innes v. Dunlop*.²

The second question relates to the party sued. To decide whether a foreign rule determining the identity of the party to be sued, or prescribing the order in which parties must be sued, is one of substance or of procedure, it is necessary to classify the exact nature and effect of the rule according to the legal system of which it forms a part.

Foreign
rules de-
termining
party to be
sued

The question is of especial importance in partnership cases. The doctrine, for instance of English law, that any one partner may be sued alone for the totality of the partnership debts is in sharp contrast with the rule obtaining in many other jurisdictions, that a creditor cannot sue an individual partner until he has first sued the partners jointly and the assets of the firm have been exhausted. A rule of this nature, if pleaded as a bar to an English action, must be classified in its foreign context. It must

¹ (1810), 2 Taunt. 82. See also *Trimbey v. Vignier* (1834), 1 Bing. (N.C.) 151, 160; *Aliwon v. Furnival* (1834), 1 C.M. & R. 277, 296.

² (1800), 8 T.R. 595. But for a contrary view see Morris (1st ed.), p. 249.

not be dismissed as procedural, if the result will be to impose a liability that does not exist by the proper law of the transaction, but if it merely requires the enforcement in a particular manner of an admitted liability, it must be dismissed as a rule affecting only the mode of process. The principle applied by the courts appears to be as follows:

If the proper law regards the defendants' liability as undoubted, though it makes it a condition precedent to an action that other parties be sued first, this is a rule of procedure that, unless it obtains in England, is ignored in English proceedings. If, on the other hand, the proper law regards the defendant as being under no liability whatever unless other parties are sued first, it imposes a rule of substance that must be observed in English proceedings.¹

In re Doetsch Thus in an action brought against the executors of a deceased member of a Spanish firm, a plea, which averred that according to Spanish law creditors could not institute a suit against the separate estate of a deceased partner until they had had recourse to and had exhausted the property of the firm, was held bad, on the ground that the rule in question determined merely the mode of procedure.²

General Steam Navigation Co. v. Guillou The distinction was neatly raised in the leading case of *General Steam Navigation Co. v. Guillou*,³ where the facts were as follows:

The plaintiffs brought an action in England to recover damages for injury caused to one of their ships by the negligent navigation of a French ship which at the time of the accident was under the direction and management of the defendants' servants. The offending ship belonged to a French company of which the defendant was a shareholder and acting director.

The third plea to the action stated that:

By the law of France the defendant . . . was not . . . responsible for or liable to be sued or impleaded individually, or in his own name or person, in any manner whatsoever, in respect of the said causes of action, . . . but by the law of France the said company alone, by their said style or title, or the master in command for the time being of the said ship, was . . . responsible for, and liable to be sued or impleaded for, the said causes of action.

The one question, therefore, that fell to be decided here was

¹ *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 877; *Bank of Australia v. Harding* (1850), 9 C.B. 661; *Bullock v. Caird* (1875), 10 Q.B. 276; *In re Doetsch*, [1896] 2 Ch. 836. The suggested principle is criticized by Wolff, *op. cit.*, p. 240.

² *In re Doetsch*, *supra*.

³ *Supra*.

whether the French law, as disclosed in the plea, absolved the defendant from all liability in any circumstances, or whether it imposed upon him an undoubted though a joint liability. The court unanimously took this distinction. Parke B., speaking for the four judges, said:¹

'If the defendant was not liable for the acts of that other by that law which is to govern this case, he has a good defence to the action; and, for the defendant, it is contended that the plea means to aver that, by the law of France, he was not liable for those acts, but that a body established by the French law, and analogous to an English corporation, were the proprietors of the vessel and alone liable for the acts of the master, who was their servant and not the servant of the individuals composing that body. . . . On the other hand the plaintiff contends that the plea only means that in the French courts the mode of proceeding would be to sue the defendant jointly with the other shareholders of the company under the name of their association: and if this be the true construction of the plea, we all concur in the opinion that the plea is bad.'

It is submitted that the plea clearly alleged a denial of liability by French law, but the judges of the Court of Exchequer were equally divided on the question, Lord Abinger and Alderson B. holding that French law merely required the defendant to be sued jointly with his co-owners in the name of the company, while Barons Parke and Gurney considered that according to the plea the defendant incurred no responsibility whatsoever, joint or several, for the acts of the master. This judicial difference of opinion upon the question of fact is of no great moment, for the importance of the decision lies in the clearness with which the general principle is stated.

It has consistently been held that the order in which property in the possession of the court is distributable among creditors must be governed by English law. The priority of creditors in such a case is a procedural matter that is determinable by the *lex fori*.² It forms no part of the transaction under which a creditor has acquired his right. It is extrinsic, and comprises in effect a privilege dependent upon the law of the country where the remedy is sought.³ Thus priorities of creditors claiming in

Priorities a
matter for
the *lex fori*

¹ At p. 895.

² *Pardo v. Bingham* (1888), L.R. 6 Eq. 485; *Ex parte Melbourn* (1870), L.R. 6 Ch. 64; *The Colorado*, [1923] P. 102; dist. priority of assignees of a *chose in action*, *supra*, p. 466.

³ *Harrison v. Sterry* (1809), 5 Cranch. 289, 298, *per* Marshall C.J.; approved in *The Colorado*, *supra*, at p. 107.

bankruptcy or on an intestacy are governed exclusively by the *lex fori*. It is the same in the case of liens. Where, for instance, two or more persons prosecute claims against a ship that has been arrested in England, the order in which they are entitled to be paid is governed exclusively by English law.¹

Distinction between question of substance and of priorities In the case of a right *in rem* such as a lien, however, this principle must not be allowed to obscure the rule that the substantive right of the creditor depends upon its proper law. The validity and nature of the right must be distinguished from the order in which it ranks in relation to other claims. Before it can determine the order of payment, the court must examine the proper law of the transaction upon which the claimant relies in order to verify the validity of the right and to establish its precise nature. When the nature of the right is thus ascertained the principle of procedure then comes into play and ordains that the order of payment prescribed by English law for a right of that particular kind shall govern.

The distinction not consistently observed It would seem, however, that the courts have not consistently observed this distinction in the case of maritime liens.² A relevant case is *The Tagus*,³ where the correct ranking of mortgagees and of the master of an Argentine ship of Buenos Aires was disputed.

The master claimed a lien for wages earned and disbursements expended in the course of several recent voyages. His right to a lien for these sums was restricted by Argentine law to the last voyage, but by English law it extended to all voyages made under his captaincy.

The preliminary problem, therefore, was to ascertain the extent of the master's right. What was his substantive right? Had he a valid lien in respect of all wages and disbursements, or only in respect of those connected with the last voyage? The remedial rule of the English *lex fori* was incapable of application until this question of the extent of his right was determined. It seems clear on principle that the matter should have been determined by the law of Argentina, to which country the ship belonged. The court, however, chose to regard the question as purely remedial, and held in accordance with English law that the master was entitled in priority to the mortgagees to the whole of his wages and disbursements. An opposite decision

¹ *The Milford* (1858), Swa. 362, 366; *The Tagus*, [1903] P. 44; *American Surety Co. v. Wrightson* (1910), 16 Com. Cas. 37; *The Colorado*, [1923] P. 102.

² See particularly 57 *L.Q.R.* 409, 413-14 (Griffith Price.)

³ [1903] P. 44.

was given in the later case of *The Colorado*,¹ where, curiously enough, the court professed to follow *The Tagus*.

The two claimants to a ship were *A*, who held a French mortgage, *The Colorado* and *B*, who had executed necessary repairs to her at Cardiff. The transaction under which *A* claimed did not constitute a mortgage as understood by English law, but its effect by French law was to give the mortgagee a right equivalent in nature and extent to the maritime lien as recognized in England. With regard to priorities the English rule is that the claim of a necessities man is postponed to that of a lienor, while by French law the claim of a mortgagee is postponed to that of a necessities man.

On these facts it was accordingly held by the Court of Appeal that *A* was entitled to rank first. French law determined the substance of *A*'s right, English law determined whether a right of that nature ranked before or after an opposing claim.

The later case of *The Zigurds*,² however, where various *The Zigurds* claimants against a Latvian ship, including an English mortgagee and English necessities men, prosecuted their claims in England, must be distinguished.

German necessities men had supplied coals to the ship in a German port, and according to German law, if the ship were under arrest in Germany, they had rights analogous to those given by a maritime lien. They contended, therefore, that, since the nature of a lienor's claim is higher than that of an English necessities man, they were entitled to priority over other claimants who had supplied goods to the vessel in England.

It was held that this contention must fail. No one denied that the claimants were ordinary necessities men, a type of creditor whose legal position is well known to English law. The evidence did not show that they constituted a higher class according to German law, but merely that if the ship was arrested by the German court they would enjoy priority over other creditors in the administration of the various claims. Once they had been definitely assigned to an ascertained class of creditor, it followed that the ranking of their claim must be determined by English law as being the *lex fori*.

(c) *The nature and extent of the remedy.*

It is obvious that a plaintiff who seeks to enforce a foreign claim in England can demand only those remedies recognized by English law, and cannot demand even them unless they harmonize with the right according to its nature and extent as

Remedies available in forum must harmonize with right put in suit

¹ [1923] P. 102.

² [1932] P. 113.

fixed by the foreign law. The position is well illustrated by an American case, where:

A widow brought an action in Texas to recover compensation for the death of her husband which had been wrongfully caused by the defendants in Mexico. By Mexican law the only relief possible was a decree of periodical payments liable to be increased or decreased according to future circumstances; by the law of Texas the only relief possible was the final award of a lump sum.¹

It was held that the Texas court could neither make an award in the Mexican sense, since its procedure was not designed to such an end, nor could it award a lump sum, since this would be to alter the extent of the substantive right.

Set-off a
matter for
lex fori

It is established that a claim to set-off affects procedure, not substance, since the issue that it raises is whether the relief claimed by the defendant shall be granted in the plaintiff's action or whether it is obtainable only by a counter-action.² If the court, in accordance with its own procedural code, refuses the privilege of set-off, it makes no attack on the substance of the defendant's claim, but, without adjudging the merits of the claim, merely rules that it must be put in suit in separate proceedings.³

✓ Damages

The subject of damages raises a problem of some difficulty in private international law, not because the principles are obscure but because the English authorities are scanty. Before the law can be stated, however, it is necessary to sketch in outline the internal law of England upon this matter.

Rules of
internal
English law

This branch of English law is not remarkable for the clear and simple manner in which it has been treated either by judges or jurists. At first sight it appears to abound in inconsistent and irreconcilable statements. In *Robinson v. Harman*,⁴ for instance,

¹ *Slater v. Mexican Nat. Ry. Co.* (1904), 194 U.S. 120; Lorenzen, p. 392. But see Schmitthoff, *English Conflict of Laws*, p. 355, who cites *Baschet v. London Illustrated Standard* (1900), 69 L.J. (Ch.) 35. In that case an action was brought for an infringement of copyright that had been acquired in France. Kekewich J. granted an injunction, though no such remedy was known to French law. It is submitted that this decision does not conflict with the statement in the text that the English remedy must harmonize with the right as recognized by the *lex causae*. The judge was required by the International Copyright Act to protect a right that had been acquired under French law. He, therefore, was justified in affording to the plaintiff the English form of protection.

² *Meyer v. Dresser* (1864), 16 C.B. (N.S.) 646.

³ But see Wolff, pp. 233-4, where it is shown that under Continental laws set-off is extra-judicial and is regarded as a matter of substance.

⁴ (1848), 1 Ex. 850.

which was an action for breach of contract, Parke B. stated a proposition that has often been quoted with approval:

‘The rule of the common law is, that when a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.’¹

Alderson B. agreed, saying that when a person breaks a contract ‘he must pay the whole damage sustained’. Six years later, in the leading case of *Hadley v. Baxendale*,² Alderson B., in delivering the judgment of a court of which Parke B. was again a member, stated another well-known and frequently quoted rule:

‘When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.’

Superficially these two statements are flatly contradictory. The first entitles the innocent party to recover the whole damage sustained, the second forbids him to recover for any loss that was neither foreseen nor contemplated by both parties at the time of the contract. It certainly cannot be contended that the rule as laid down by Parke B. in *Robinson v. Harman* must be taken subject to considerable limitations in practice in view of the rule in *Hadley v. Baxendale*, for it is perfectly obvious that *if the two rules were intended to regulate the same matter*, the second would destroy, not merely limit, the first. In *Hadley v. Baxendale* the failure of the defendant to deliver the shaft in accordance with the contract was the direct cause of the stoppage of the plaintiff’s mill for an excessive length of time, and if the rule in *Robinson v. Harman* had been binding the plaintiff ought to have received compensation for the whole period during which his mill was idle, since otherwise he would not have been in the same position as if the contract had been performed.

Two further statements may be quoted with regard to the relation between contracts and torts:

‘The law is that the damages must be the direct and natural consequence of the breach of obligation complained of. The law is the same in this respect with regard both to contracts and to torts’: *per* Bowen L.J.³

¹ To the same effect see *Williams v. Agius Ltd.*, [1914] A.C. 510, 522.

² (1854), 9 Ex. 340.

³ *Cobb v. G.W.R.*, [1893] 1 Q.B. 459, 464.

'Generally, however, it is clear on the authorities that the measure of damages . . . is the same in tort and breach of contract': *per* Scrutton L.J.¹

This application of the same rule to contracts and to torts appears at first sight to create a difficulty. *Hadley v. Baxendale* affirms that in contract only such damages are recoverable as follow naturally, i.e. in the ordinary course of things, from the breach; on the other hand, *In re Polemis & Furness Withy & Co.*² affirms with equal emphasis that in torts the whole of the direct damage is recoverable, whether it follows naturally and in the ordinary course of things from the wrong or not.

What then is the explanation of these apparent inconsistencies? It is impossible to believe that Barons Parke and Alderson in *Hadley v. Baxendale* intended to jettison or even to qualify a rule which had appeared to them so obvious and elementary only six years earlier; equally impossible is it to believe that Scrutton L.J., with whom Bankes L.J. and several other judges have agreed, spoke without circumspection when he enunciated a common proposition for contracts and torts. It is submitted, however, that there is in fact no conflict between the statements quoted above, and that the rule in *Robinson v. Harman* is subject to no limitations whatsoever, whether in practice or in theory. The truth would appear to be that judicial pronouncements and the statements in textbooks are unintelligible unless two entirely different questions are segregated. In brief, remoteness of liability or remoteness of damage must be distinguished from measure of damages. The rules relating to remoteness indicate what kind of loss actually resulting from the commission of a tort or from a breach of contract is actionable; the rules for the measure of damages show the method by which compensation for an actionable loss is calculated. Damage may be, but damages can never be, too remote. In tort the rule of remoteness established by the *Polemis Case* is that a tortfeasor is responsible for all the direct consequences of his wrongful act, even though they could not reasonably have been anticipated. The analogous rule in contracts, however, is different. The breach of a contract, like the commission of a tort, causes material loss, and it is that loss to which the rule in *Hadley v. Baxendale* applies. In other words, it is impossible to claim monetary compensation in respect even of an admitted loss unless it arose naturally and in the ordinary course of things from the breach of con-

¹ *The Edison*, [1932] P. 52, 61.

² [1921] 3 K.B. 560.

tract. But the rule that regulates the measure of damages is the same for contracts as it is for torts. It requires *restitutio in integrum*. In torts compensation must be paid for the whole of the direct loss; in contracts, as *Robinson v. Harman* insists, compensation must be paid for the whole of the natural or foreseeable loss.

Alive to the distinction between remoteness of liability and measure of damages we can now attempt to state the relevant principles of private international law.

There can be no doubt, at least on principle, that remoteness of liability must be governed by the proper law of the obligation that rests upon the defendant. Not only the existence, but also the extent, of an obligation, whether it springs from a breach of contract or the commission of a wrong, must be determined by the system of law from which it derives its source.¹ The proper law admittedly determines the nature and content of the right created by a contract, and it is clear that the kind of loss for which damages are recoverable upon breach forms part of that content. Both the nature and the content of a contractual right depend in part upon the question whether certain consequential loss that may ensue if the contract is unperformed will be too remote in the eye of the law. If the proper law determines what constitutes a breach, it is also entitled to determine the consequences of a breach.

Suppose, for the sake of argument, that by French law a purchaser who sues a seller for non-delivery of the goods is entitled to recover for the loss that he has suffered through failure to carry out any sub-contracts that he may have made.

A purchaser under a French contract for the sale of goods acquires, on this hypothesis, a right of a perfectly definite extent, and the principles of private international law require that his position in this respect shall be neither improved nor prejudiced by the fact that he happens to bring his action in England. If the court applies the rule of internal English law, that compensation cannot be recovered for sub-contract losses, the result is to diminish the content of the right as fixed by the

¹ *Slater v. Mexican National Ry. Co.* (1904), 194 U.S. 120; Lorenzen, p. 392. Wolff, pp. 242-4, agrees and gives several pertinent examples of what falls under the head of remoteness of damage. But in *Kohnke v. Karger*, [1951] 2 K.B. 670, 677, Lynskey J. said: "The principles on which damages are assessed differ in different countries, but in assessing damages I must apply the law and practice of these courts." On the facts the reference was to remoteness of liability.

governing law.¹ Of course, an exception must be made when the type of loss for which recovery may be had in the foreign country is contrary to the distinctive policy of the *lex fori*.

Remote-
ness of
liability in
contract
cases In *D'Almeida Araujo Lda v. Sir Frederick Becker & Co Ltd.*, a case of breach of contract, Pilcher J. based his decision upon this distinction between remoteness of liability and measure of damages.² The facts were these:

By a contract, made on March 20 and governed as to substantial validity by Portuguese law, the plaintiffs, merchants in Lisbon, agreed to sell 500 tons of palm oil to the defendants, a British company carrying on business in London.

With a view to the fulfilment of their undertaking, the plaintiffs agreed to buy 500 tons of palm oil from one Mourao, a Portuguese dealer. This contract provided that in the event of its breach, the party in default should indemnify the other to the extent of 5% of the total value of the contract, a sum which in fact amounted to the equivalent of £3,500. The plaintiffs were forced into the payment of this sum, since the defendants broke the contract of March 20.

In the present action, the plaintiffs claimed to recover by way of damages the £3,500 which they had been obliged to pay under the indemnity. It was admitted that according to English law the loss suffered by reason of this payment would found no claim to damages, since it was not the kind of loss that ensued in the usual course of things from such a breach of contract. The learned judge, however, held that English law was irrelevant. He said:

'I conclude that the question whether the plaintiffs are entitled to claim from the defendants the £3,500 which they have paid to Mourao, depends on whether such damage is or is not too remote. In my view the question here is one of remoteness, and therefore falls to be determined in accordance with Portuguese law.'³

Question of
interest
one of
substance It is also established that whether interest is payable upon a contractual debt, and if so, at what rate, is a matter to be governed by the proper law.⁴ The question often arises on the dishonour of a bill of exchange. Here the general rule at common law is that whether interest is recoverable on dishonour depends

¹ For further examples see Martin Wolff, pp. 244-6.

² [1953] 2 Q.B. 329.

³ Ibid. at p. 338.

⁴ *Arnott v. Redfern* (1825), 2 C. & P. 88, where the proper law of a contract made in London to be performed in Scotland was held to be English law, *sed quare*; *Fergusson v. Fyffe* (1841), 8 Cl. & F. 121, 140, *per* Lord Cottenham; *Dacey*, p. 708.

upon the proper law of the contract under which the defendant rendered himself liable.¹

'So,' says Story,² 'if a bill of exchange be made in one State and in-

third State, the rate of damages upon the dishonour of the bill will be against each party according to the law of the place where his own contract had its origin, either by making or by indorsing the bill.'

In the case, however, of a bill which is dishonoured abroad, the Bills of Exchange Act, 1882, has now provided that in lieu of normal damages the holder may recover from the drawer or indorser, and a drawer or indorser having been compelled to pay may recover from any party liable to him the amount of re-exchange, with interest thereon until payment.³

It follows from the *D'Almeida Case* that remoteness of liability in tort is a matter of substance to be governed, presumably, by the *lex loci delicti*. To rule otherwise would, indeed, permit a plaintiff to exact compensation for what was no ground of liability in the *locus delicti*. The kind of loss meriting reparation would vary with the forum.⁴ Thus compensation for the loss of a wife's companionship and services, though not admissible in the country where she had been injured by the defendant's negligence, would be recoverable were the husband to sue in England.⁵ That such a question is not one of procedure was directly affirmed by the Court of Session in *Naftalin v. L.M.S.*,⁶ where, as we have seen,⁷ a plaintiff was not allowed in a Scottish action to recover damages by way of *solatium* in respect of an injury negligently caused to his son in England. Such damages are recoverable by Scottish, but not by English, law. Authority so direct as this in a case of tort is not to be found in England. But in *Ekens v. East India Co.*⁸ the plaintiff, who

Remoteness of liability in tort cases

¹ *Allen v. Kemble* (1848), 6 Moo. P.C.C. 314; *Gibbs v. Fremont* (1853), 9 Ex. 25.

² S. 307.

³ Bills of Exchange Act, 1882, s. 57 (2). This means in the case, for instance, of a bill payable in Paris as much English money as will buy in France at the rate of exchange on the day of dishonour the number of francs for which the bill is drawn, plus the interest and necessary expenses. See the explanation in Byles, *Bills of Exchange*, note to s. 57 (2).

⁴ 22 Can. B.R. 851. See the very strong statement of Duff C.J. in the Canadian case of *Livesley v. Horst*, [1924] S.C.R. 605, cited Hancock, *Torts in the Conflict of Laws*, p. 123.

⁵ Cp. the Canadian case of *Lester v. McAnulty*, [1944] S.C.R. 317.

⁶ [1933] S.C. 259; followed in *M'Elroy v. M'Allister*, [1949] S.C. 110.

⁷ *Supra*, p. 275, note 2.

⁸ (1717), 1 P. Wms. 395, and see Wharton, s. 478 c.

brought trover for a ship which had been converted in the East Indies, was allowed interest on the value of the ship at the rate prevailing in that country. Again, it was held in *Cope v. Doherty*¹ that a limitation put by the Merchant Shipping Act, 1854, upon what was recoverable in respect of a collision at sea affected the substance of liability, not procedure. The matter is confused owing to the peculiar English doctrine that for a tort to be actionable at all in this country it must contain two ingredients, namely unjustifiability by the *lex loci delicti* and actionability by the *lex fori*.² It might, therefore, be argued that since the *lex fori* is of equal importance with the *lex loci* in determining the primary question of liability, it has an equal claim to be heard on the question whether recovery may be had for a particular item of damage. Despite the case of *Machado v. Fontes*,³ however, the truth would appear to be that a person injured by a wrong abroad cannot recover compensation in England unless compensation is recoverable according to the *lex loci delicti*.⁴

Measure of
damages

The next question is—By what law is the measure of damages governed? Those textbook writers who deal with the matter affirm in terms that it is governed by the proper law of the obligation, but when their language is analysed it will generally be found that they have in mind what we have called remoteness of liability.⁵ A rule as to the measure of damages in the narrow sense is a mere rule of calculation which operates only after the injury or loss in question has been found to be free from the vice of remoteness. Its function is to quantify in terms of money the sum payable by the defendant in respect of the injury, whether it be a tort or breach of contract, for which his liability has already been determined by the proper law. A plaintiff who seeks to recover compensation in England in respect of an obligation that is governed as to substance by a foreign law has already acquired a right the nature and extent of which have been finally determined. His object is that his right as established shall be converted by the English court into a right to receive a definite sum of money. He is entitled to be paid in full for the injury suffered and he takes advantage of the English process and machinery in order to exact this payment.

¹ (1858), 2 De G. & J. 614, 626; see also in the court below, 4 K. & J. 367, 384.

² *Supra*, p. 268 et seqq.

³ [1897] 2 Q.B. 231; *supra*, p. 274.

⁴ *Supra*, p. 276.

⁵ See, for example, Beale on the *Conflict of Laws*, s. 412. 1; Wharton, ss. 427 Q. 478 c; Goodrich on the *Conflict of Laws*, pp. 254-6.

It would seem, therefore, that all questions that arise in the course of this quantification of the amount payable should be governed by English law as being the *lex fori*. If, for instance, the defendant pleads a tender of the amount due, he must prove that the tender is in accordance with English law, for if the task of the court is to fix the amount payable it must also be competent to decide whether in its view payment has in effect been already made.¹

Lex fori
governs

Again, it is obvious that an English court cannot order payment except in English currency, for otherwise the order could not be enforced by the ordinary writs of execution.² If an action is brought in England to recover a debt payable in foreign currency or to recover damages for the breach of a foreign contract, or for a foreign tort where the damages are fixed,³ the amount of the English judgment must be based on the quantity of English sterling that would be required to purchase in England at the ruling rate of exchange the amount of the foreign currency due.⁴ There was formerly a controversy whether the rate of exchange prevailing at the date of the wrong or at the date of judgment must be followed in making this conversion from foreign to English currency.⁵ The date chosen may be of great importance to the parties in view of the violent fluctuations of the rate of exchange that not infrequently occur in the modern world. It is now settled that the relevant date is the date of the wrong. The extent of the loss for which the plaintiff is entitled to compensation falls to be determined at the date when it was suffered, not at the date when the judgment happens to be delivered.

Conversion
of foreign
into
English
currency

'If the date taken be that not of the tort but of the judgment, it is giving the plaintiff not damages for the tort, but damages also for the postponement of the payment of those damages until the date of the judgment. If such later damages can be recovered, as under circumstances they may be if the defendant improperly postpones payment, they would be recovered in the form of interest. They would be damages not for the original tort, but for another and a subsequent wrongful act.'⁶

This rule applies not only to an action for tort but also to an

¹ *The Baarn*, [1933] P. 251.

² *Manners v. Pearson & Son*, [1898] 1 Ch. 581, 587, per Lindley M.R.

³ *Celia (s.s.) v. s.s. Volturno*, [1921] 2 A.C. 544.

⁴ *Manners v. Pearson & Son*, *supra*, at p. 593, per Vaughan Williams L.J.

⁵ For a discussion of the matter see Mann, *The Legal Aspect of Money*, pp. 288 et seqq.

⁶ *Celia (s.s.) v. s.s. Volturno*, [1921] 2 A.C. 544, 563-4 per Lord Wrenbury.

action for breach of contract,¹ or for the recovery of a liquidated debt² or for an account,³ or for the non-payment of a promissory note or a bill of exchange.⁴

There are, however, two cases in which it is provided by statute that the conversion into pounds sterling shall be made according to the rate of exchange prevailing at the time of judgment. First, where damages are awarded against an international carrier by aircraft;⁵ secondly, where a foreign judgment expressed in foreign currency is registered in England under the Foreign Judgments (Reciprocal Enforcement) Act, 1933.⁶ This last rule was applied in an action brought in England to recover the damages awarded for breach of contract by an American judgment that was not registrable under the Act of 1933. 'The American judgment', remarked the learned judge, 'is the immediate source from which the defendants' liability flows in the present action, and no earlier date can be called into consideration.'⁷

(d) *Execution.*

Lex fori
governs
exclusively

Judgments and the execution of judgments, being integral parts of the process which the plaintiff has elected to adopt, are necessarily subject to the *lex fori*. The particular mode of execution admitted by that law, whether more or less favourable to the plaintiff than that recognized by the proper law of the transaction, has exclusive application. This principle covers such matters as whether the judgment may be satisfied out of land or goods; whether debts in the hands of third parties can be attached by garnishment; whether a receiver may be appointed; whether a writ *ne exeat regno* is procurable; or whether personal constraint is permissible.

¹ *Madeleine Vionnet v. Wills*, [1940] 1 K.B. 72; *Di Ferdinando v. Simon Smits & Co.*, [1920] 3 K.B. 409.

² *Société des Hôtels du Touquet-Paris-Plage v. Cumming*, [1921] 3 K.B. 459; *Graumann v. Treitel*, [1940] 2 All E.R. 188. *In re Russian and Commercial Industrial Bank*, [1955] Ch. 148, explaining *Cummings v. London Bullion Co. Ltd.*, [1952] 1 K.B. 327.

³ *Manners v. Pearson*, [1898] 1 Ch. 581.

⁴ *Salim Nasrallah Khoury v. Khayat*, [1943] A.C. 507.

⁵ Carriage by Air Act, 1932, s. 1 (5).

⁶ S. 2 (3). For the main provisions see *supra*, pp. 603 et seqq.

⁷ *East India Trading Co. Inc. v. Carmel Exporters and Importers Ltd.*, [1952] 2 Q.B. 439, 444. It follows that since the plaintiff's original cause of action does not merge in the foreign judgment (*supra*, p. 598) he may sue in England for breach of contract, in which case the date of conversion will be the date of the breach.

Thus, where a Portuguese, who had been arrested in the course of English proceedings for non-payment of a debt which was due to a Spaniard under a Portuguese contract, applied to be discharged from custody, on the ground that he was not liable to arrest by the proper law of the contract, the application was refused.¹

¹ *De la Vega v. Vianna* (1830), 1 B. & Ad. 284; to the same effect *Brettilot v. Sandos* (1837), 4 Scott 201. The earlier cases of *Talleyrand v. Boulanger* (1797), 3 Ves. 447, and *Melan v. Fitzjames* (1797), 1 Bos. & Pul. 138, are overruled.

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